Supreme Court, U.S.
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No. 01-305 FEB 28 2001

In The

Supreme Court of the United States

AEC CORPORATION,

Petitioner,

versus

RICHARD J. DANZIG, SECRETARY OF THE NAVY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Petition for Writ of Certiorari

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142 pp

QUESTIONS PRESENTED

I. May the Court of Appeals for the Federal Circuit substitute the common law of contracts for the Federal Acquisition Regulations ("FAR") as a basis for reinstating a default termination of a Government Contract?

A. Is it permissible for the Court of Appeals to reinstate a default termination based upon the common law doctrine of "failure to provide assurances" concerning timely performance, without regard to the express terms of FAR 52.249-10, which provides that the right to proceed shall not be terminated if the delay in completing the work is due to acts of the Government (and where the trial board and Court of Appeals found that the contractor was due time extensions as a result of Government delay)?

B. Is it permissible for the Court of Appeals to reinstate a default termination based upon the common law doctrine of "failure to provide assurances" concerning timely performance, without regard to the express terms of FAR 49.402-3(f) which require the contracting officer to consider, among other things, the excuses for any failure in performance?

II. May the Court of Appeals refuse to give the factual findings of the Armed Services Board of Contract Appeals the deference mandated by the Contract Disputes Act and, instead, reinstate the Government's default termination based upon the Court of Appeals' own contrary findings of fact?

III. May the Court of Appeals reinstate a Government default termination based upon a putative common law defense not asserted by the Government before the trial board, without regard to the contractor's constitutional right to notice and an opportunity to present evidence concerning such defense to the trier of fact?

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the United States Court of Appeals for the Federal Circuit is contained in the caption of this Petition.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The Petitioner AEC Corporation is a Florida corporation. There is no parent or publicly held company owning 10% or more of the company's stock.

TABLE OF CONTENTS

PAGE(S)

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

I. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED THE COMMON LAW OF CONTRACTS FOR THE FAR 9

A. THE DECISION OF THE COURT OF APPEALS IGNORES THE EXPRESS TERMS OF FAR 52.249-10, AND EFFECTIVELY ELEVATES THE COMMON LAW OF CONTRACTS OVER THE *FAR* BY JUDICIAL FIAT, THEREBY PERMITTING (IF NOT ENCOURAGING) UNRESTRAINED AND UNFAIR ACTIONS BY CONTRACTING OFFICERS, WITH DELETERIOUS CONSEQUENCES FOR GOVERNMENT PROCUREMENT 9

B. IN OVERTURNING THE ASBCA'S DECISION THAT THE DEFAULT WAS IMPROPER BY FINDING THAT THE PETITIONER FAILED TO PROVIDE ASSURANCES, THE COURT OF APPEALS DID NOT APPLY FAR 49.402-3(f) 13

II. THE COURT OF APPEALS IGNORED THE "SUBSTANTIAL EVIDENCE" STANDARD OF REVIEW IMPOSED BY THE CONTRACTS DISPUTE ACT 16

III. THE APPELLATE COURT DEPRIVED AEC OF THE RIGHT TO NOTICE AND AN OPPORTUNITY FOR HEARING, THEREBY VIOLATING ITS DUE PROCESS RIGHTS, BY DETERMINING THAT AEC WAS PROPERLY DEFAULT TERMINATED ON GROUNDS THAT WERE NEVER RAISED AT THE TRIAL BELOW AND NOT ASSERTED BY THE GOVERNMENT AS AN ASSIGNMENT OF ERROR ON APPEAL 23

CONCLUSION 28

APPENDIX ..... App. i

TABLE OF AUTHORITIES

PAGE(S)

CASES

AEC Corporation,
ASBCA No. 42920, 98-2 BCA ¶ 29,952 (1998) 1

AEC Corporation,
ASBCA No. 42920, 99-1 BCA ¶ 30,181 (1999) 1

Amadeo v. Zant,
486 U.S. 214 (1988) 17

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 17

Boddie v. Connecticut,
401 U.S. 371 (1971) 23

Boggs v. West,
188 F.3d 1335 (Fed. Cir. 2000) 26

Bonneville Associates v. United States,
30 Fed. Cl. 85 (1993) 17

Braun, Inc. v. Dynamics Corp.,
975 F.2d 815 (Fed. Cir. 1992) 26

Cascade Pacific International v. United States,
773 F.2d 287 (Fed. Cir. 1985) 15

Cleveland Board of Education v. Loudermill,
470 U.S. 532 (1985) 23

Danzig v. AEC Corporation,
224 F.3d 1333 (Fed. Cir. 2000) 1, 20

Darwin Construction Co., v. U.S.,
811 F.2d 593 (Fed. Cir. 1987) 15

Davies Precision Machining, Inc. v. United States,
35 Fed. Cl. 651 (1996) 10

DeVito v. United States,
413 F.2d 1147 (Ct. Cl. 1969) 13

Frank v. Department of Transportation,
35 F.3d 1554 (Fed. Cir. 1994) 26

Fruin-Colnon Corporation v. United States,
912 F.2d 1426 (Fed. Cir. 1990) 19

Fuentes v. Shavin,
407 U.S. 67 (1972) 23

G.L. Christian and Associates v. United States,
312 F.2d 418 (Ct. Cl. 1963) 10

H. Landau & Co. v. United States,
886 F.2d 322 (Fed. Cir. 1989) 26

Hormel v. Helvering,
312 U.S. 552 (1941) 26

Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,
456 U.S. 844 (1982) 18

Janowsky v. United States,
23 Cl. Ct. 706 (1991) 17

L.W. Holt v. Commonwealth of Virginia,
381 U.S. 131 (1965) 24

Lisbon Contractors, Inc. v. United States,
828 F.2d 759 (Fed. Cir. 1987) 19

Lockheed Martin Corp. v. Walker,
149 F.3d 1377 (Fed. Cir. 1998) 19

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 23

Menches Tool & Die, Inc.,
ASBCA No. 21469,
78-1 BCA ¶ 13,167 (1978) 15

Morrison Knudsen Corp. v. Firemen's Fund Insurance Co.,
175 F.3d 1221 (10th Cir. 1999) 10

National Union Fire Insurance Co.,
ASBCA No. 34744,
90-1 BCA ¶ 22,266 (1990) 15

Olsberg Excavating Co. v United States,
3 Cl. Ct. 249 (1983) 17

Reflectone, Inc. v. Dalton,
60 F.3d 1572 (Fed. Cir. 1995) 17

Roseburg Lumber Co. v. Madigan,
978 F.2d 660 (Fed. Cir. 1992) 19

Schlesinger v. United States,
390 F.2d 702 (Ct. Cl. 1968) 13

Singleton v. Wulff,
428 U.S. 106 (1976) 26

State Industries, Inc. v. Mor-Flo Industries, Inc.,
948 F.2d 1573 (Fed. Cir. 1991) 19

Wickham Contracting Co. v. Fischer,
12 F.3d 1574 (Fed. Cir. 1994) 19

STATUTORY MATERIALS AND REGULATIONS

U.S. Constitution, amendment V 2

28 U.S.C. § 1254(1)(1993) 1, 5

28 U.S.C. § 2101(c)(1994) 1, 5

41 U.S.C. § 601 et seq. 6

41 U.S.C. § 609(b)(1987) 2, 17, 19

44 U.S.C. § 1505 10

FAR 1.103 10

FAR 1.104 10

FAR 2.101 10

FAR 49.402-3(f) 4, 13, 16

FAR 52.249-10 ..... *passim*

Office of Federal Procurement Policy Act
Amendments of 1974 (Pub.L. No. 93-400) 9

Public Law Number 96-83 10

Senate Report Number 95-1118 at 1 (1978) 17

TREATISE

W. Noel Keyes,
Government Contracts Under the
Federal Acquisition Regulations,
§ 1.2 (2d ed. 1996)..... 10

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit in Richard J. Danzig, Secretary of the Navy v. AEC Corporation, 224 F.3d 1333 (Fed. Cir. 2000), is set forth in the Appendix hereto. [App. 1-13] Additionally, the Order of the United States Court of Appeals for the Federal Circuit denying Appellee AEC Corporation's Petition for Panel Rehearing dated November 30, 2000 is also set forth in the Appendix. [App. 87]

The opinion of the Armed Services Board of Contract Appeals ("ASBCA") in AEC Corporation, ASBCA No. 42920, 98-2 BCA ¶29,952 (1998) is set forth in the Appendix hereto. [App. 14-81] The ASBCA's opinion on the Navy's Motion for Reconsideration dated September 18, 1998, ASBCA No. 42920, 99-1 BCA ¶30,181 (1999), is also set forth in the Appendix. [App. 82-86]

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Federal Circuit reversing and remanding the decision of the Armed Services Board of Contract Appeals was entered on September 25, 2000. Appellee AEC Corporation filed a Petition for Panel Rehearing which was denied on November 30, 2000. This Petition for Writ of Certiorari is filed within ninety (90) days from the date of the denial of the Petition for Panel Rehearing. 28 U.S.C.§2101(c)(1994).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C.§1254(l)(1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

41 U.S.C. § 609(b)(1987):

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

FAR 52.249-10, Default (Fixed-Price Construction). (4/84):

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete

the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if ---

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include--

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,

(x) Unusually severe weather, or

(xi)Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and . .

FAR 49.402-3(f), Procedure for default:

(f) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

STATEMENT OF THE CASE

SUMMARY

AEC Corporation ("AEC"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit. In this case, the United States Court of Appeals for the Federal Circuit substituted its own view of the common law of contracts for the Federal Acquisition Regulations ("FAR") that circumscribe the Government's right to impose the drastic sanction of default termination on a government contractor. The Court of Appeals further substituted its own view of the propriety of the Government's actions for the findings of the Armed Services Board of Contract Appeals, and made no attempt to comply with the requirement of the Contract Disputes Act that the Board's findings of fact be sustained unless not supported by substantial evidence. Finally, the Court reinstated the Government's default termination of Petitioner's contract based upon a putative defense not asserted by the Government below, in violation of the contractor's constitutional right to notice and an opportunity to present evidence concerning such defense to the trier of fact. In so doing, the Court of Appeals ignored or violated the most fundamental regulatory, statutory, and constitutional protections afforded a Government contractor.

PROCEEDINGS BELOW

The action below arose out of the default termination of Petitioner AEC's contract with the United States Navy (hereafter "the Navy" or "the Government") for the construction of a Naval and Marine Corps Reserve Training Center in Miami, Florida (the "Project").[1] On 11 April 1991, when AEC's performance was approximately 90% complete, the Government advised AEC and its surety that it intended to issue a default termination on 20 April 1991. After unilaterally issuing certain contract modifications to "tie up loose ends" prior to termination, the Government formally issued a default termination on 22 April 1991. As detailed in the Contracting Officer's memorandum dated 22 April 1991, the termination (which was authorized 10 April 1991) was based entirely on AEC's failure to complete performance by 3 March 1991. The stated basis for the default in the Contracting Officer's Final Decision was AEC's failure to make progress in the work and for default in performance.

Because the Government had waived the original contract completion date, had never established 3 March 1991 as a new completion date, and had never granted AEC the time extensions it was due as a result of delays caused by the Government (which would have extended the completion date until well after 22 April 1991), AEC instituted the action below in the Armed Services Board of Contract Appeals (the "ASBCA" or "Board") pursuant to the Contract Disputes Act. 41 U.S.C. § 601, et seq. Although the stated basis for default was AEC's failure to make progress towards the completion date, before trial, the Government also asserted as bases for the default, among other things: (i) that AEC abandoned the Project; (ii) that AEC repudiated the

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[1] Formally, the Navy's contract was with the Small Business Administration ("SBA") which, pursuant to Section 8(a) of the Small Business Act, subcontracted performance of the work to AEC at a firm fixed price of $4,361,631.

Contract; or (iii) that the Government requested AEC to provide assurances at a 9 April 1991 meeting, and that AEC failed to do so.

After twelve days of trial, after hearing testimony from 18 witnesses, and considering nearly 600 exhibits, the Board issued a 47-page opinion containing 36 pages of detailed and supported findings of fact, and 11 pages of conclusions of law. [App. 14-81] The Board concluded that the default termination of a minority contractor, AEC, was wrongful because the Government failed to grant AEC time extensions to which it was entitled [App. 75-76, 80], failed to prove that AEC could not perform the work within the time remaining for performance [App. 76, 80], and failed to prove that AEC repudiated the contract. [App. 77] Furthermore, the Board concluded that AEC did not abandon the Project [App. 78], and that AEC was not placed in a position where it was required to provide assurances at the 9 April 1991 meeting and therefore did not fail to provide assurances. [App. 78] Accordingly, the Board converted the termination for default to a termination for the convenience of the Government. [App. 80][2]

The Government appealed the Board's decision to the United States Court of Appeals for the Federal Circuit, asserting the following assignments of error on appeal:

(1) the Board's initial decision applies an incorrect legal standard to the Navy's default termination based upon AEC's failure to make progress;
(2) the Board's opinion upon reconsideration failed to recognize the parties' valid informal completion date; and
(3) the Board erred by applying an incorrect legal standard for anticipatory repudiation.

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[2] The Government moved for reconsideration, but the Board found no merit in the Government's motion. [App. 82-86]

Notably, the Government did not assert as an assignment of error that AEC failed to provide assurances, either on April 9, 1991 or at any other time.

On September 25, 2000, the United States Court of Appeals for the Federal Circuit issued its decision, reversing the default termination decision of the Board, remanding the decision for limited liability determinations, and concluding on grounds not asserted by the Government, that AEC failed to provide adequate assurances in response to the Government's cure notice.[3] [App. 1-13]

Petitioner AEC timely filed a Petition for Panel Rehearing on November 16, 2000. The Court of Appeals for the Federal Circuit denied the Petition for Panel Rehearing on November 30, 2000. [App. 87]

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[3] The fact that such basis was never asserted by the Government as grounds for appeal is further evidenced by the fact that at oral argument on June 9, 2000, the Court of Appeals, sua sponte, inquired of the Government as to whether, at trial below, it relied upon a 3 April 1991 correspondence as a failure to provide assurances, or whether the Navy focused on the 9 April 1991 meeting. The Government counsel wrongfully replied that it believed the contention was made at trial below. The Court of Appeals then requested that the Government provide further citations to the record related to the 3 April 1991 correspondence.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED THE COMMON LAW OF CONTRACTS FOR THE FAR

A. THE DECISION OF THE COURT OF APPEALS IGNORES THE EXPRESS TERMS OF FAR 52.249-10, AND EFFECTIVELY ELEVATES THE COMMON LAW OF CONTRACTS OVER THE *FAR* BY JUDICIAL FIAT, THEREBY PERMITTING (IF NOT ENCOURAGING) UNRESTRAINED AND UNFAIR ACTIONS BY CONTRACTING OFFICERS, WITH DELETERIOUS CONSEQUENCES FOR GOVERNMENT PROCUREMENT

In this case, the Court of Appeals for the Federal Circuit has established a rule of decision whereby a government contractor may be terminated for default based upon a purported failure to provide adequate assurances, even though the Federal Acquisition Regulations ("FAR") governing federal contracts severely restrict the Government's right to impose the drastic sanction of default termination, and the termination in this instance plainly violated pertinent FAR restrictions (as the Board below found and the Court of Appeals did not dispute.) The Court's finding effectively elevates the common law of contracts over the FAR, thereby fundamentally undermining the force and import of the FAR.

The FAR was promulgated pursuant to Executive Order 12352, March 17, 1982, by the Secretary of Defense and the Administrators of the General Services Administration and the National Aeronautics and Space Administration. The FAR was developed pursuant to the requirements of the Office of Federal Procurement Policy Act Amendments of 1974 (Pub. L. No. 93-400), as amended by Public Law

Number 96-83, and OFPP Policy Letter 85-1, Federal Acquisition Regulations System, dated August 19,1985. See also FAR 1.103. Essentially, the FAR was established "for the codification and publication of uniform policies and procedures for acquisition by all executive agencies." W. Noel Keyes, Government Contracts Under the Federal Acquisition Regulations § 1.2 (2d ed. 1996). The FAR applies to all "acquisitions," or contracts with appropriated funds for supplies or services, including construction, for use by the Government, except where expressly excluded. FAR 1.104 & 2.101.

The FAR is codified in Chapter 1 of Title 48 of the Code of Federal Regulations in 52 parts, and was made effective on April 1, 1984. These regulations, as applicable to the instant case, have the same force and effect of law. G.L. Christian and Associates v. United States, 312 F.2d 418, 424 (Ct. Cl. 1963), cert. denied, 375 U.S. 954 (1963); see also 44 U.S.C. § 1505. Accordingly, the FAR provisions are binding on courts and control the interpretation of federal contracts. Morrison Knudsen Corp. v. Firemen's Fund Ins. Co., 175 F.3d 1221, 1230 (10th Cir. 1999); Davies Precision Machining, Inc. v. United States, 35 Fed. Cl. 651, 657-58 (1996).

FAR 52.249-10 Default (Fixed-Price Construction) (APR 1984) provides that:

> (a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to compete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

Importantly, 52.249-10 further provides, however:

> (b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if --
>
> > (1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor.
> >
> > Examples of such causes include --
> >
> > * * *
> >
> > (ii) Acts of the Government in either its sovereign or contractual capacity . . .

Thus, pursuant to the Default clause, the Government has the remedy of termination where the contractor fails to prosecute the work with diligence that will ensure timely performance. Whether there is satisfactory diligence or progress is determined by whether completion is insured "within the time specified in the contract including any extensions."

Moreover, FAR 52.249-10(b) provides that the contractor may not be terminated if the failure to prosecute the work arises from causes beyond the control and without the fault or negligence of the contractor, such as when the delays in performance were caused by the Government.

In the action below, the Government failed to perform an analysis of the time extensions due AEC and failed to issue proper time extensions due AEC. Notwithstanding its own fault for the failure in performance, the Government issued a cure notice to the contractor requesting that it cure its slow progress which was endangering performance by a certain "completion date." However, this "completion date," as determined by the Board and affirmed by the Court of Appeals, was not a proper date since, among other things, it

failed to include the time extensions due the contractor as a result of Government delay. The Board found, and the Court of Appeals affirmed, that AEC could not be terminated for failure to make progress since it was due time extensions and the Government failed to prove that AEC could not complete the work in the time remaining, as extended by an appropriate analysis of the Government delays. Accordingly, the cure notice requiring AEC to "cure" its "slow performance" was improper and invalid as a basis for default termination.

Nevertheless, the Court of Appeals inexplicably upheld the default termination based on its determination that AEC did not respond adequately to the cure notice by not providing "adequate assurances" by when it would complete performance. This finding essentially reads out the requirement of FAR 52.249-10 ignoring the entire underlying basis for the issuance of the cure notice, and the finding by the Board, and affirmed by the Court of Appeals, that the "failure to make progress" was due to Government-caused delay. The result puts a contractor in a tenuous position such that if the Government fails to issue proper time extensions, but nonetheless improperly issues a cure notice, the contractor must respond affirmatively or be faced with a default. In other words, the Government may overcome its breach of failing to issue proper time extensions, simply by sending out a cure notice, and when the contractor responds that it cannot give a time for completion since the Government has not extended the contract date, the Government may terminate the contractor. The result defies all logic and is inconsistent with the FAR requirements and principles.[4]

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[4] Moreover, this result, in effect, shifts the burden of proof to the contractor to set a new completion date or explain by when it can complete, notwithstanding the Government's obligation to issue time extensions for its delay.

In effect, the Court of Appeals' decision allows the Government to impose the drastic remedy of default termination, see Schlesinger v. United States, 390 F.2d 702, 709 (Ct. Cl. 1968); see also DeVito v. United States, 413 F.2d 1147, 1153 (Ct. Cl. 1969), without regard to the protections afforded Government contractors by the FAR. If allowed to stand, the Court's decision will make it much easier for the Government to default terminate contractors, or to threaten defaults. The resulting change in the Government's ability to coerce contractors to comply with invalid Government directives threatens to undermine the carefully crafted balance of power reflected in the FAR, with unforseen (and likely deleterious) effects on the number of companies willing to perform Government contracts and the prices the Government is required to pay.

More fundamentally, the Court of Appeals' decision casts doubt upon the primacy of the FAR in all aspects of Government contracting, not merely default terminations. The potential consequences of such an implication - - whether by Contracting Officers exercising their discretion or Boards and Courts adjudicating government contract disputes - - are extremely serious. Accordingly, this Court should grant certiorari, and review the decision of the Court of Appeals for the Federal Circuit.

B. IN OVERTURNING THE ASBCA'S DECISION THAT THE DEFAULT WAS IMPROPER BY FINDING THAT THE PETITIONER FAILED TO PROVIDE ASSURANCES, THE COURT OF APPEALS DID NOT APPLY FAR 49.402-3(f).

In holding that the Government's default termination was erroneous on the basis of failure to make progress, but nonetheless would be upheld on the separate grounds of Petitioner's alleged "failure to provide assurances" in response to the cure notice, the Court of Appeals failed to consider and apply FAR 49.402-3(f). FAR 49.402-3(f)

provides that if there is a failure in performance, prior to determining to terminate a contractor for default, the contracting officer must consider certain factors. This requirement is consistent with the principle that a specific failure, in and of itself, on the part of the contractor, will not necessarily justify the drastic sanction of default. Rather, the contracting officer is required to perform a detailed analysis to review the bases and causes of such failure, and whether a default is appropriate. The Court of Appeals determined that Petitioner failed to provide assurances, but in so finding, the Court did not then analyze such failure under the applicable FAR principles. Instead, the Court of Appeals ignored or abandoned the FAR requirements and determined that the default was proper.

Specifically, FAR 49-402-3(f) provides:

> The contracting officer shall consider the following factors in determining whether to terminate a contract for default:
>
> > (1) The terms of the contract and applicable laws and regulations.
> > (2) The specific failure of the contractor and the excuses for the failure.
> > (3) The availability of the supplies or services from other sources.
> > (4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.
> > (5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a

> termination for default upon the contractor's capability as a supplier under other contracts.
> (6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments or advance payments.
> (7) Any other pertinent facts and circumstances.

Applying these procedural requirements, the United States Court of Appeals for the Federal Circuit, in other case law, has held that before terminating a contract for default, a contracting officer must analyze, for example, the specific failure of the contractor and the cause for such failure, or whether the defaulted contractor can complete the contract more expeditiously than a replacement contractor. Darwin Constr. Co. v. U.S., 811 F.2d 593, 598-99 (Fed. Cir. 1987).

Thus, in accordance with the standard default clause, the contractor's failure to perform, which the Court of Appeals found to be in this case a failure to provide assurances, may be excused where it was beyond the contractor's control and without its fault. See Cascade Pacific Int'l v. United States, 773 F.2d 287, 292 (Fed. Cir. 1985); Nat'l Union Fire Ins. Co., ASBCA No. 34744, 90-1 BCA ¶ 22,266 (1990) ("We do recognize that a default termination would not lie if appellant's refusal to give assurance was due to factors beyond its control and without its fault or negligence, or that of its contractors"); Menches Tool & Die, Inc., ASBCA No. 21469, 78-1 BCA ¶ 13,167 (1978) (holding that the ASBCA will review the facts surrounding a default termination to determine if an excuse exists to justify the contractor's expressed inability to proceed with the work).

Here, the Board found that the Government caused AEC's delays. [App. 71-74] As a result, any inability of AEC to respond to the cure notice, in which the Government requested AEC to provide assurances that it would complete

by a certain "completion date," is without the fault of AEC, and therefore excusable. The Court of Appeals' failure to apply the FAR 49.402-3(f) factors warrants review by this Court.

For the same reasons expressed above with respect to FAR 52.249-10, the Court of Appeals' decision to ignore the FAR in favor of its application of common law contractual principles effectively allows the Government to impose the drastic remedy of default termination, without regard to the protections afforded Government contractors by the FAR. The resulting change in the balance of power between Government and contractor that is reflected in the FAR - - not only with regard to default terminations but with regard to all Government contract issues governed by the FAR - - raises extremely serious procurement policy issues. Accordingly, the Supreme Court should grant certiorari, and review the decision of the Court of Appeals for the Federal Circuit.

II. THE COURT OF APPEALS IGNORED THE "SUBSTANTIAL EVIDENCE" STANDARD OF REVIEW IMPOSED BY THE CONTRACTS DISPUTE ACT

In 1978, Congress enacted the Contract Disputes Act ("CDA"), which fixes standards for the litigation of government contract claims. The legislative history reveals the important purpose of the Act:

> The Contract Disputes Act of 1978 provides a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims. The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide

> alternate forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and Government agencies . . . .

S. Rep. No. 95-1118, at 1 (1978), reprinted in 1978 U.S.C.C.A.N. 5235. Indeed, the federal courts have frequently noted the importance of the establishment and purpose of the CDA. See Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1582 (Fed. Cir. 1995); Janowsky v. United States; 23 Cl. Ct. 706, 717 (1991); Olsberg Excavating Co. v. United States, 3 Cl. Ct. 249, 252 (1983); Bonneville Assocs. v. United States, 30 Fed. Cl. 85, 89 (1993), aff'd 43 F.3d 649 (Fed. Cir. 1994).

The CDA specifically provides the standard of review for decisions of agency boards of contract appeals, stating that "the decision on any question of fact [by the Board of Contract Appeals] shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." 41 U.S.C. § 609(b) (1987). By overruling the Board's findings, the Court of Appeals for the Federal Circuit has ignored this important framework established by Congress.

This Court has reversed and remanded decisions where the Court of Appeals did not apply the proper standard of review. The appeals court may not reverse the trial court's findings of fact, even if the court believes that it would have found differently if it had been sitting as the trier of fact, so long as the trial court's factual findings are plausible. See Amadeo v. Zant, 486 U.S. 214, 223-24 (1988) (reversing court of appeals' reversal of district court decision where court of appeals failed to identify evidence in the record that contradicted the district court's conclusions); Anderson v. City of Bessemer City, 470 U.S. 564, 576-77 (1985) (reversing court of appeals' reversal of district court decision

where district court's findings were not clearly erroneous); Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 856-58 (1982) (reversing and remanding court of appeals' reversal of district court's ruling and holding that "an appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.'").

In the course of ruling in favor of the Government, the United States Court of Appeals for the Federal Circuit ignored the "substantial evidence" standard of review required by the Contract Disputes Act. Most disturbingly, the Court made no attempt to review or analyze the evidence relied upon by the Board, or to explain why that evidence was not "substantial." Instead, the Court simply replaced the Board's findings with its own. Such unfettered factual findings by the Court of Appeals is plainly contrary to the requirements of the Contract Disputes Act, and vitiates the protections promised Government contractors under that Act. The potential consequences of the Court of Appeals' tacit repudiation of the substantial evidence standard are far-reaching, and warrant a writ of certiorari, and review of the Court of Appeals' decision.

In the action below, the factual findings of the ASBCA were supported by substantial evidence, and pursuant to the standard of review, the Court of Appeals is required to uphold those findings. The Court of Appeals failed to determine, as it must to reverse a decision of the ASBCA, that the ASBCA's findings of fact were not supported by substantial evidence. Accordingly, the Court of Appeals' decision was in violation of the "substantial evidence" standard for review, and the decision of the Court of Appeals should be reversed.

A. Standard Of Review for the Court of Appeals

The ASBCA's fact findings are final and conclusive and "shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence." 41 U.S.C. § 609(b); see Lockheed Martin Corp. v. Walker, 149 F.3d 1377, 1379 (Fed. Cir. 1998). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Wickham Contracting Co. v. Fischer, 12 F.3d 1574, 1577 (Fed. Cir. 1994).

Moreover, the Court of Appeals will not alter the ASBCA's findings of fact even if the record contains contrary or conflicting evidence. Fruin-Colnon Corp. v. United States, 912 F.2d 1426, 1428 (Fed. Cir. 1990). Where there is conflicting evidence, the Court must defer to the trial court's findings. Roseburg Lumber Co. v. Madigan, 978 F.2d 660, 665 (Fed. Cir. 1992); State Indus., Inc. v. Mor-Flo Indus., Inc., 948 F.2d 1573, 1577 (Fed. Cir. 1991); Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987). Consistently, there existed no grounds, and the Court of Appeals articulated none, by which the Court of Appeals could second-guess the factual findings that the ASBCA reached after reviewing the record and hearing live testimony.

B. Factual Findings Relied upon by the Court of Appeals Which Are Contrary to the ASBCA's Findings

The Court of Appeals improperly made findings of fact, which were directly contrary to the findings of the ASBCA. Based upon these "findings," the Court of Appeals reversed the decision of the ASBCA made after twelve days of trial, after hearing testimony of eighteen witnesses, and considering nearly 600 exhibits and hundreds of pages of

briefing.[5] The Court of Appeals could not and did not conclude that the ASBCA's findings were not supported by substantial evidence and even the Government made no such assertion. Because the ASBCA's findings of fact were indisputably supported by substantial evidence, the Court of Appeals could not set aside the ASBCA's factual findings. Instead, the Court of Appeals deviated from the accepted standard for appellate review and improperly rendered its own factual determinations, requiring this Court to reverse the decision.

The key factual determinations relied upon by the Court of Appeals and the contrary findings of the ASBCA supported by substantial evidence are as follows:

Court of Appeals	**ASBCA Findings**
a. The 27 April 1991 date set forth in the cure notice was a contract completion date or an agreed-to completion date. Danzig v. AEC Corp., 224 F.3d 1333, 1338 (Fed. Cir. 2000). [App. 11]	a. 23 December 1990 was the Contract Completion Date, and the Navy, by unilateral modifications on 17 April 1991, extended that date to a backdated completion date of 3 March 1991. [App. 76] At the time of default, the Navy had no valid completion date by which to measure progress. [App. 83]

[5] It is inconceivable that the Court of Appeals could conclude that any of the ASBCA's findings were not supported by substantial evidence, as the Navy did not even assert that the ASBCA's findings are not supported by substantial evidence, but rather merely set forth its version of the facts as if it had been adopted by the ASBCA, which it was not.

	AEC was entitled to time extensions from the 23 December 1990 completion date to at least 16 May 1991. [App.74]
b. AEC did not respond to the Navy's Show Cause notice which the Navy presented at the 9 April 1991 meeting. AEC Corp., 224 F.3d at 1335, 1339. [App. 12-13]	b. AEC did respond to the Navy's Show Cause Notice. The Show Cause Notice was not official at the time of the 9 April 1991 meeting since it was unsigned, but was formally provided to AEC on 11 April 1991. AEC timely responded on 22 April 1991, since 21 April 1991 was a Sunday. The Navy did not await AEC's response before terminating the Contract. [App. 47-48, 54]
c. AEC was terminated on 22 April 1991. AEC Corp., 224 F.3d at 1335. [App. 5]	c. The Navy decided to terminate AEC prior to 9 April 1991 and advised AEC's surety of the default, who in turn advised AEC. The Navy also provided AEC's surety with a takeover agreement on 11 April 1991. [App. 49-50]
d. The fireloop delay asserted by AEC as a reason for delay was resolved in 1990. AEC Corp., 224 F.3d at 1339. [App. 13]	d. The fireloop issue became critical in 1991. The fireloop work was not accepted by the Navy until 11 March 1991, and

	delayed follow-on work that was being performed at the time the cure notice was issued. [App. 59-60]
e. AEC removed files from the site, disconnected the telephone and did not continue to make progress. AEC Corp., 224 F.3d at 1339. [App. 11-12]	e. AEC returned the documents to site and the telephone had been disconnected accidentally when a CQC telephone was disconnected. AEC continued to make progress. [App.46, 78]
f. There was no evidence that the Navy caused any financial difficulties to AEC. AEC Corp., 224 F.3d at 1339. [App. 12-13]	f. The Navy failed to issue modifications for time and money, and there was no evidence that AEC's financial dispute with its surety impacted performance. [App. 33, 52, 79]

Clearly, the Court of Appeals' "findings of fact" that it relied upon are in contradiction of the findings of the ASBCA, which are supported by substantial evidence. Nowhere in its decision does the Court of Appeals assert that the ASBCA findings were not supported by substantial evidence. Rather, the Court of Appeals develops its own statements of fact, as if these facts represented the trial court record. The Court of Appeals' clear departure from the appropriate standard of review requires this Court to reverse the decision. The Court of Appeals' failure to consider the trial record below, and its attempt to reach back and *sua sponte* make factual determinations in the first instance, are clear error. If such a result is allowed to stand, the protection afforded Government contractors by the substantial evidence standard will be vitiated. Accordingly, Petitioner requests

this Court to exercise its supervisory powers and review and reverse the decision of the Court of Appeals.

III. THE APPELLATE COURT DEPRIVED AEC OF THE RIGHT TO NOTICE AND AN OPPORTUNITY FOR HEARING, THEREBY VIOLATING ITS DUE PROCESS RIGHTS, BY DETERMINING THAT AEC WAS PROPERLY DEFAULT TERMINATED ON GROUNDS THAT WERE NEVER RAISED AT THE TRIAL BELOW AND NOT ASSERTED BY THE GOVERNMENT AS AN ASSIGNMENT OF ERROR ON APPEAL.

Having ignored the requirements of the FAR, and the CDA's "substantial evidence" standard for review, the Court of Appeals based its decision entirely upon an argument not raised before the trial court, and not asserted as an error on appeal, to rule in favor of the Government. Specifically, the Court of Appeals' determination that AEC failed to adequately provide assurances in response to the Government's 20 March 1991 cure notice is a new issue, not properly raised by the Government at trial before the ASBCA or relied upon as the basis for its default termination. Accordingly, AEC was never provided the opportunity to present evidence and argument with regard to this issue at the trial level, in violation of its due process rights.

"An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing . . . .'" Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)); see also Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-34 (1982); Boddie v. Connecticut, 401 U.S. 371, 377-78 (1971).

The Court described the importance of due process in Fuentes v. Shevin:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions.
>
> * * *
>
> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . (And n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'

407 U.S. 67, 80-81 (1972) (citations omitted).

Furthermore, "[t]he right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues." L.W. Holt v. Commonwealth of Virginia, 381 U.S. 131, 136 (1965) (holding motions for change of venue to escape biased tribunal raise relevant and essential constitutional issues). The decision of the Court of Appeals, which effectively overturns the trial court's findings on an issue not raised at trial, violates AEC's due process rights.

The only issue properly raised below with regard to failure to provide assurances, as set forth in the Navy's briefs, was the Navy's assertion that it verbally requested assurances at the 9 April 1991 meeting (not through the cure notice) and that AEC did not respond to this 9 April 1991 request for assurances.[6] [App. 78] The ASBCA adjudicated this issue, and found that the Navy never requested assurances at the 9 April 1991 meeting and rejected this argument as a basis for default. [App. 78] Specifically, the ASBCA found that:

> The Navy also now attempts to justify the default termination on the ground that, at the meeting of 9 April 1991, AEC failed to provide assurances that it could complete the contract. Our findings reflect that appellant attended that meeting under the impression that it was to be a progress meeting, and nothing in the Navy's minutes reflect that it was out of the ordinary or that appellant [AEC] was ever placed in a position where it failed to assure the Navy that it could complete performance.[7]

[App. 78]

The issue of whether AEC provided adequate assurances in response to the Navy's cure notice of 20 March 1991 was not raised at the trial court and not relied upon by the Navy.

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[6] The only mention of the response to the Navy's cure notice in the context of assurances is a one-sentence statement in the Navy's Reply Brief, filed after hearing to which AEC could not respond, where the Navy argues that AEC repudiated the contract.

[7] Furthermore, the ASBCA found that AEC did not repudiate the Contract. [App. 77]

A federal appellate court may not consider an issue not presented and determined below at the trial level. See Singleton v. Wulff, 428 U.S. 106, 120 (1976) (holding that the court of appeals should not have proceeded to resolve the merits of a case where the petitioner did not have the opportunity to address the merits, or to present evidence or legal arguments in favor of his position); Hormel v. Helvering, 312 U.S. 552, 556 (1941) (holding that a court of appeals may not pass upon questions other than those which were directly and squarely presented in the proceedings below). Accordingly, if the Government failed to present an issue at the ASBCA, then the Court of Appeals for the Federal Circuit must affirm the trial court's judgment without considering the new issue. See Boggs v. West, 188 F.3d 1335, 1337 (Fed. Cir. 2000); Frank v. Dep't of Transp., 35 F.3d 1554, 1559 (Fed. Cir. 1994); Braun, Inc. v. Dynamics Corp., 975 F.2d 815, 821 (Fed. Cir. 1992). At a minimum, the Court of Appeals should remand the case to the ASBCA to decide the issue so that AEC is provided the opportunity to present evidence and argument. See H. Landau & Co. v. United States, 886 F.2d 322, 324 (Fed. Cir. 1989). The fact that the Court of Appeals improperly considered this new issue is even plainly recognized by the Court of Appeals in its decision:

> The Board rejected the government's contention that AEC's failure to give assurances in response to the cure notice justified the default termination. The Board, however, focused solely on the April 9 meeting and concluded that at that meeting the Navy had not asked AEC to give assurances of timely completion. To be sure, the government's briefs before the Board focused mainly on the April 9 meeting, but the briefs did refer to AEC's overall inability or unwillingness to provide assurances of

> timely completion, including references to AEC's April 3 and April 5 letters to the Navy. We therefore do not limit our analysis of the failure to give assurances to the April 9 meeting.

[App. 10]

A review of the Navy's briefs verifies that the issue was never raised below, since with regard to "failure to provide assurance," the Navy's Post-Hearing brief provides only that "AEC failed to provide assurances at the 9 April 1991 meeting."

Moreover, the issue of whether AEC provided adequate assurances was not even raised as grounds for appeal. Rather, the Navy's only stated bases for appeal to the Court of Appeals for the Federal Circuit was whether the ASBCA applied the wrong legal standard for failure to make progress or anticipatory repudiation, or whether the ASBCA failed to consider the alleged agreed upon completion date in its analysis of failure to make progress.

The Court of Appeals did rule that the proper legal standard for failure to make progress was applied by the ASBCA. The Court of Appeals, however, did not address at all whether the ASBCA applied the proper legal standard for anticipatory repudiation, but rather performed an independent limited factual review and analysis, and then determined that AEC "failed to provide adequate assurances" to the Navy's cure notice. The Court of Appeals' "review" was not consistent with the usual course of judicial proceedings and its mandate for appellate review.

Whether AEC provided adequate assurances in response to the 20 March 1991 cure notice was an issue not presented to the ASBCA, and not even an error cited on appeal. AEC has been denied its due process right to notice and to present evidence and legal argument on this new issue. Accordingly, the decision of the United States Court of Appeals for the Federal Circuit must be reversed.

CONCLUSION

For all of the foregoing reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Federal Circuit and, ultimately, to vacate and reverse the order below and affirm the ASBCA decision, or in the alternative, to remand the decision to the ASBCA trial level where the new issue (raised only by the Court of Appeals) as to whether AEC failed to adequately provide assurances in response to the Government's 20 March 1991 cure notice can be decided after presentation of evidence and argument.

Respectfully submitted,

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TABLE OF CONTENTS
Appendix to Petition

Page

Opinion,
United States Court of Appeals
for the Federal Circuit
entered September 25, 2000 1

Opinion,
Armed Services Board of Contract Appeals
entered August 14, 1998 14

Opinion on Motion for Reconsideration,
Armed Services Board of Contract Appeals
entered December 11, 1998 82

Order,
Denying Petition for Rehearing,
United States Court of Appeals
for the Federal Circuit,
entered November 30, 2000 87

FAR 49.402-3 88

FAR 52.249-10 94

41 U.S.C. § 609 100

United States Court of Appeals for the Federal Circuit

99-1343

Richard J. Danzig,
SECRETARY OF THE NAVY,

Appellant,

v.

AEC CORPORATION,

Appellee.

Thomas A. Coulter, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for appellant. With him on the brief were David W Ogden, Acting Assistant Attorney General; and David M. Cohen, Director. Of counsel on the brief was Ellen M. Evans, Trial Attorney, Office of the General Counsel, Department of the Navy, Naval Facilities, Engineering Command, Washington, DC.

Vivian Katsantonis, Watt, Tieder, Hoffar & Fitzgerald, L.L.P., of McLean, Virginia, argued for appellee. With her on the brief was Robert G. Watt.

Appealed from: Armed Services Board of Contract Appeals

United States Court of Appeals for the Federal Circuit

99-1343

Richard J. Danzig,
SECRETARY OF THE NAVY,
Appellant,

v.

AEC CORPORATION,
Appellee.

DECIDED: September 25, 2000
ENTERED: September 25, 2000

Before MICHEL, BRYSON, and GAJARSA, Circuit Judges.

BRYSON, Circuit Judge.

The dispute in this case arose when the government terminated its contract with AEC Corporation for default. The Armed Services Board of Contract Appeals ruled that the default termination was improper, and the government has appealed from that ruling. We reverse and remand for further proceedings.

I

In May 1989, the Navy awarded AEC a contract to complete the construction of a Naval and Marine Corps Reserve Training Center in Miami, Florida. The contract called for AEC to finish the work by October 14, 1990. By

late 1990, it was apparent that AEC was behind schedule. AEC was having financial difficulties with its surety, and those problems were delaying the progress of the work. A cure notice issued by the Navy in December 1990 led to a meeting between the Navy and AEC on January 23, 1991. At that meeting, AEC provided a schedule with a projected completion date of April 16, 1991. The Navy agreed not to terminate the contract for default if AEC continued to make progress according to that schedule. AEC subsequently submitted a revised schedule with April 26, 1991, as the completion date. The Navy accepted that revised schedule, although for reasons that are unclear from the record, the parties subsequently used the following day, April 27, 1991, as the projected completion date for the project.

In late February 1991, AEC's surety froze the project's bank account, and the number of workers doing productive work on the project began to decline. At a meeting on March 5, 1991, the Navy asked why the project was progressing so slowly. AEC advised the Navy that it was unable to make progress on the project because the surety would not release funds from the project's bank account. The Navy responded by stating that AEC was close to being terminated for default.

On March 20, 1991, the Navy sent AEC a letter containing a cure notice. In the letter, the Navy stated that its agreement at the January 23 meeting not to pursue termination for default was contingent upon AEC's diligently pursuing completion of the contract by April 27, 1991. Since the January 23 meeting, the Navy charged, "work in place continues to progress at a dangerously low pace." Based on the decreasing number of man-hours being devoted to the job, the Navy expressed concern that AEC would not be able to complete the project by April 27. The Navy therefore stated that it considered AEC's "failure to diligently pursue completion a condition that is endangering performance of the contract" and advised that unless that

condition was cured within 10 days, the Navy would consider terminating the contract for default.

AEC responded to the cure notice with a letter dated April 3, 1991. In the letter AEC explained that while it had previously appeared possible to complete the project by April 27, 1991, "numerous factors have prevented [the project's] scheduled progress." First, AEC claimed that "the many changes and delays caused by the Government have made an April completion impossible." Second, AEC complained that since January 1991 the surety had interfered with AEC and hampered its progress on the job by blocking the release of funds sufficient to enable AEC to pay its subcontractors and meet other project expenses. The "financial strangulation" by the surety, AEC stated,

> has progressed to the point of not only preventing AEC from meeting its April 27, 1991 completion date, it has made it impossible for AEC to predict an ultimate completion date at this time. As a matter of fact, unless [the surety and its affiliate] restrain [sic] from their present conduct and release the funds currently in [the project's] bank account, it is doubtful that AEC will ever be able to complete the project.

The Navy responded by letter the next day, stating that it could not evaluate AEC's response because AEC's contentions that burdensome changes and government-caused delays had made an April 27 completion impossible were vague and unsubstantiated. The Navy directed AEC to provide a detailed response to substantiate its allegations. The Navy added that the March 20 cure notice required AEC to cure the dangerously slow work pace within 10 days, and it "strongly encourage[d]" AEC to address the cure issue.

On April 5, AEC answered by stating that it "cannot cure the deficiency stated in your Cure Notice due to the restrictions that [the surety and its affiliate] have imposed on the disbursement of funds from the joint escrow account. Consequently we cannot give you any assurance as to when the project will be completed." AEC added that "[t]he financial strain of this action has been aggravated by costs incurred as a result of delays and additional work caused by the government." In response to the Navy's request for substantiation of the allegations regarding government-caused delays and changes, AEC responded that "due to time constraints, we refer you to correspondence which we sent you in preparation for our meeting of January 23, 1991." In a second letter dated the same day, AEC advised the Navy that it had reduced its work force at the job site to two supervisory employees because of the financial restrictions imposed by the surety.

The Navy called a meeting at the site on April 9, 1991, at which it gave AEC an unsigned letter directing AEC to "show cause" why the contract should not be terminated for default. The letter directed AEC to respond within ten days. AEC received a signed copy of the letter on April 11. During the following 10 days, AEC did not respond to the Navy's "show cause" letter, and throughout that period AEC had only a handful of workers on the job site.

On April 22, 1991, the Navy terminated the contract for default. The termination notice stated that the contract was being terminated "due to failure to make progress in the work and for default in performance." AEC responded by letter the same day, expressing surprise that the Navy had terminated the contract without waiting for AEC's response to the show cause letter.

AEC appealed the termination. After the contracting officer denied the appeal, AEC appealed to the Armed Services Board of Contract Appeals, which held the termination invalid. The Board concluded that modifications

and delays to AEC's contract performance attributable to the government entitled AEC to an extension of time, which changed the contract completion date to May 16, 1991. The Board further ruled that the Navy had presented "no evidence that AEC could not complete contract performance by the extended contract completion date [May 16, 1991] produced by an appropriate analysis of the time extensions to which AEC is entitled." Accordingly, the Board concluded that "the Navy's default termination for failure to make progress was improper." The Board also rejected the Navy's argument that AEC had breached the contract by anticipatory repudiation. Because AEC had not "expressed an unequivocal unwillingness or inability to perform," the Board concluded that it had not repudiated the contract and that the default termination could not be sustained on that ground. Finally, the Board rejected the Navy's argument that the default termination was justified because AEC failed to give the Navy assurances that it could complete the contract on a timely basis.

The government sought reconsideration. In its reconsideration motion, the government argued, inter alia, that the Board had used the wrong legal standard in determining that the Navy was unjustified in terminating the contract because of AEC's failure to make progress. The government argued that the Board had required it to prove that it was impossible for AEC to complete performance in the time remaining. The Board responded that it had not applied that standard, but had applied the standard urged by the government, i.e., whether the Navy had a reasonable basis for concluding that there was no reasonable likelihood the contractor could perform the contract within the time remaining for contract performance. The Board explained that even though it had applied the government's proposed standard, it had found against the government. Because the Navy "had no reasonable basis to conclude that there was no reasonable likelihood that the remaining work could be

performed within a required time for performance," i.e., by May 16, 1991, the date the Board determined to be the correct completion date in light of adjustments for government-ordered changes in the contract, the Board reaffirmed its holding that the termination for default was improper.

II

On appeal, the government renews its contention that the Board applied an erroneous legal standard to evaluate the propriety of the default termination. According to the government, the Board found the termination to be per se improper because the Navy (1) failed to anticipate that the Board would award AEC an extension of the contract completion date to May 16, 1991, and (2) failed to present evidence that AEC could not have completed performance by then.

We disagree with the government's contention. In its opinion on reconsideration, the Board expressly stated that it had required the government to show that it was reasonable for the Navy to conclude that AEC would be unable to complete the project by what the Board found to be the proper completion date. The government acknowledges that to be the correct standard, see Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987), but suggests that while the Board articulated that standard, it did not faithfully apply it.

We are not persuaded that the Board mouthed one standard but applied a different one. The Board expressly found that the Navy could not reasonably have concluded that there was no reasonable likelihood that AEC could have completed the contract by May 16, 1991. We therefore reject the government's argument that the Board applied the wrong standard for evaluating the merits of the default termination decision.

We agree with the government, however, with respect to one of the alternative grounds it has raised on appeal. In response to the Navy's March 20, 1991, cure notice, AEC failed to give the Navy adequate assurances that it could complete the contract on a timely basis or even that it could continue to make progress toward completion. That failure, the government argues, justified the Navy's decision to terminate the contract for default. Because we agree with the government on that issue, we reverse the Board's decision and hold that the default termination was valid.

When the government has reasonable grounds to believe that the contractor may not be able to perform the contract on a timely basis, the government may issue a cure notice as a precursor to a possible termination of the contract for default. See Discount Co. v. United States, 554 F.2d 435, 438-39 (Ct. Cl. 1977) (government issued a cure notice when the contractor had done no substantial work during the construction season). When the government justifiably issues a cure notice, the contractor has an obligation to take steps to demonstrate or give assurances that progress is being made toward a timely completion of the contract, or to explain that the reasons for any prospective delay in completion of the contract are not the responsibility of the contractor. See Tubular Aircraft Prods., Inc. v. United States, 213 Ct. Cl. 749, 750 (1977) ("Plaintiff's minimal performance efforts coupled with its perilous financial situation warranted the issuance of a cure notice. Thereafter, plaintiff's failure to advise the Government that corrective action would be taken in order to make performance at levels reasonably commensurate with contract requirements financially possible, justified the default termination."); Composite Laminates, Inc. v. United States, 27 Fed. Cl. 310, 323-24 (1992) ("When the government issues a cure notice, in order for a contractor to avoid default, a contractor must be able to provide adequate assurances to the government that it can complete contract requirements on time.");

International Verbatim Reporters, Inc. v. United States, 9 Cl. Ct. 710, 723 (1986) (once the cure notice was issued to the contractor, "its failure to correct, explain or communicate with [the government] during the period what corrective action that would be taken, justified a termination for default"); Vatex America, GPOBCA No. 08-96, 1998 WL 750866 (Oct. 14, 1998); Twigg Corp., NASABCA No. 62-0192, 93-1 B.C.A. (CCH) ¶ 25,318, at 126,157 (Aug. 5, 1992); RFI Shield-Rooms, ASBCA Nos. 17374, 17991, 77-2 B.C.A. (CCH) ¶ 12,714, at 61,732 (Aug. 11, 1977).

The law applicable to a contractor's failure to provide assurances of timely completion is a branch of the law of anticipatory repudiation. See, e.g., Discount Co., 554 F.2d at 441 (when the government was not assured of timely completion, the court could properly "rely upon cases involving abandoned or repudiated contracts"). At common law, anticipatory repudiation of a contract required an unambiguous and unequivocal statement that the obligor would not or could not perform the contract. See Dingley v. Oler, 117 U.S. 490, 503 (1886); Cascade Pac. Int'l v. United States, 773 F.2d 287, 293 (Fed. Cir. 1985). As the Restatement of Contracts has recognized, however, modern decisions do not limit anticipatory repudiation to cases of express and unequivocal repudiation of a contract. Instead, anticipatory repudiation includes cases in which reasonable grounds support the obligee's belief that the obligor will breach the contract. In that setting, the obligee "may demand adequate assurance of due performance" and if the obligor does not give such assurances, the obligee may treat the failure to do so as a repudiation of the contract. Restatement (Second) of Contracts § 251 (1981). The Uniform Commercial Code has adopted a similar rule for contracts involving the sale of goods. See U.C.C. § 2-609.

The law of government contracts has adopted that doctrine, expressing it as a requirement that the contractor give reasonable assurances of performance in response to a

validly issued cure notice. See Tubular Aircraft Prods., Inc. v. United States, 23 Cont. Cas. Fed. (CCH) ¶ 81,327, at 86,619 (Ct. Cl. Trial Div. Nov. 29, 1976) (recommended decision) (citing the Restatement and stating that "parties are entitled to ask for reassurances when persons with whom they have contracted have by word or deed created uncertainty about their ability or intent to perform and they are entitled to treat the failure to provide such assurances as a repudiation of the contract"), approved and op. adopted by court, id. at 86,610, 213 Ct. Cl. 749 (1977); National Union Fire Ins., ASBCA No. 34744, 90-1 B.C.A. (CCH) ¶ 22,266, at 111,855 (Aug. 23, 1989); Salzburg Enters., ASBCA No. 29509, 87-2 B.C.A. (CCH) ¶ 19,761, at 99,994 (Mar. 30, 1987). That rule, as the Restatement explains, rests "on the principle that the parties to a contract look to actual performance 'and that a continuing sense of reliance and security that the promised performance will be forthcoming when due, is an important feature of the bargain.'" Restatement (Second) of Contracts § 251 cmt. a (quoting U.C.C. § 2-609 cmt. 1).

The Board rejected the government's contention that AEC's failure to give assurances in response to the cure notice justified the default termination. The Board, however, focused solely on the April 9 meeting and concluded that at that meeting the Navy had not asked AEC to give assurances of timely completion. To be sure, the government's briefs before the Board focused mainly on the April 9 meeting, but the briefs did refer to AEC's overall inability or unwillingness to provide assurances of timely completion, including references to AEC's April 3 and April 5 letters to the Navy. We therefore do not limit our analysis of the failure to give assurances to the April 9 meeting.

Based on AEC's performance during February and March 1991, the Navy had a reasonable basis for concern that the contract would not be completed by April 27, 1991, the completion date that AEC had projected on February 5

and presented to the Navy to avoid default termination at that time. The Navy was therefore entitled to issue a cure notice demanding a correction of the slow pace of the work or a satisfactory explanation of how AEC planned to complete the work on a timely basis. The issuance of a cure notice was justified under the circumstances, even if the circumstances did not, at that point, justify a termination for default. See National Union Fire Ins., 90-1 B.C.A. (CCH) at 111,855 (noting that the "right to demand assurance need not spring merely from a performance or progress failure, but may be asserted whenever reasonable grounds exist to believe a breach will be committed").

AEC's response to the cure notice did not satisfy its obligation to provide assurances to the Navy that it could timely complete the contract. AEC did not dispute the Navy's assertion in its cure notice that at its current pace it would not be able to complete the contract by April 27. In fact, AEC's April 3 letter stated that "the financial strangulation" of AEC by its surety had prevented AEC "from meeting its April 27, 1991 completion date" and had "made it impossible for AEC to predict an ultimate completion date at this time." Moreover, AEC stated that unless the surety and its affiliate released funds in the project's bank account, "it is doubtful that AEC will ever be able to complete the project." When the Navy asked for a more specific response, AEC responded on April 5 with a letter in which it reiterated that "due to the restrictions that [the surety and its affiliate] have imposed on the disbursement of funds from the joint escrow account . . . we cannot give you any assurances as to when the project will be completed." Clearly, the April 3 and April 5 letters offered nothing to allay the Navy's concerns about AEC's ability to complete the contract on a timely basis.

At about the time of the April 3 and April 5 letters, AEC removed the contract files and office equipment from the work site and disconnected the telephone at the work-site

office. At the same time, AEC advised the Navy that it had been forced to reduce its work force at the facility to two persons and that it could not "continue to incur costs on this project given the financial restrictions being imposed on us by [the surety and its affiliate]." Finally, at the meeting between representatives of the Navy and AEC on April 9, AEC was given a notice to show cause within 10 days why the contract should not be terminated for default, and AEC failed to respond within the 10-day period.

AEC's conduct, like its responses to the cure notice, clearly failed to provide the requisite assurances that AEC would complete the project on a timely basis. Rather than providing an assurance of timely completion, AEC told the Navy, through both its words and its conduct, that the contract was not likely to be completed until AEC was able to work out its financial difficulties with its surety. AEC offered the Navy no reason to believe that those difficulties would be resolved any time in the near future. Moreover, although AEC makes some effort to suggest that its financial difficulties were the fault of the government, there is no finding by the Board to that effect and no evidence supporting that suggestion. Thus, there is no reason in this case to depart from the normal rule that the contractor's financial difficulties are not a legitimate excuse for its failure to make progress. See, e.g., TGC Contracting Corp. v. United States, 736 F.2d 1512, 1515 (Fed. Cir. 1984); Kennedy v. United States, 164 Ct. Cl. 507, 514 (1964); Howell Tool & Fabricating, Inc., ASBCA No. 47939, 96-1 B.C.A. (CCH) ¶ 28,225, at 140,941 (Feb. 29, 1996); Transdyne Corp., ASBCA No. 12834, 69-1 B.C.A. (CCH) ¶ 7615, at 35,371 (Apr. 2, 1969).

AEC's assertions of government-caused delay similarly did not respond adequately to the Navy's request for assurances. Although AEC referred to government-caused delays in both the April 3 and April 5 letters, it was not specific as to what changes had caused delay or how

much delay it considered the government to have caused, nor did it represent that it could complete the contract within the additional time to which it believed it was entitled. In the April 3 letter, AEC simply made a blanket assertion that government changes and delays had been partially responsible for AEC's failure to adhere to the schedule it had agreed to at the January 23 meeting. In its April 5 letter, after being asked for more specificity on that issue, AEC simply referred to material it had provided to the Navy before the January 23 meeting, even though that meeting predated the setting of the April 27 target date for completion of the project. Although AEC conceded that some of the issues referred to in the January 23 material had been resolved, it argued that other issues remained. Of the remaining issues, however, AEC identified only the fire loop around the building as a change that caused additional delay. On that issue, the Board found that the government-caused delay affected AEC's performance primarily in the last half of 1990, even before the January 23 meeting. AEC's responses to the cure notice thus did not adequately explain how its slow progress was the product of delay caused by the government or was otherwise excusable.

Under these circumstances, we conclude as a matter of law that AEC failed to respond adequately to the Navy's reasonable request for assurances of timely performance. The Navy was therefore entitled to regard AEC's failure to provide such assurances as a breach of the contract justifying termination of the contract for default. On remand, the Board shall address the remaining issues of liability based on our holding that the default termination was valid.

REVERSED and REMANDED.

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)
AEC Corporation	) ASBCA No. 42920
	)
Under Contract No.	)
N62467-88-C-0646	)

APPEARANCES FOR THE APPELLANT:

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OPINION BY ADMINISTRATIVE JUDGE LIPMAN
(Entered August 14, 1998)

This is an appeal from the contracting officer's decision terminating the captioned construction contract for default. The record consists of documentary evidence as well as the transcript of testimony of 12 days of hearing.

The sole issue before the Board is the propriety of the termination for default. The Navy terminated the contract due to appellant's alleged "failure to make progress in the work and for default in performance." In this appeal, the Navy has advanced several other alleged grounds justifying

the default termination, and it maintains that appellant's performance problems were primarily caused by the actions and omissions of its surety. Our findings, therefore, explore the contractor-surety relationship in some depth. Appellant alleges that it incurred performance delay due to defective contract documents and Navy actions or omissions relating to specific work items under the contract. We address those specific work items in the latter part of our findings.

FINDINGS OF FACT

On 12 May 1989, the Small Business Administration (SBA), pursuant to the provisions of Section 8(a) of the Small Business Act, entered into a negotiated contract with the Navy's Naval Facilities Engineering Command, Southern Division (SOUTHDIV) for the construction of a Naval and Marine Corps Reserve Training Center in Miami, Florida (Stips. 1, 15). The SBA subcontracted performance of the work to appellant (or AEC) at a firm fixed price of $4,361,631 (Stip. 2).

The contract contained the standard construction contract clauses including FAR 52.249-10 "Default (Fixed-Price Construction) (APR 1984)." It also provided for the imposition of liquidated damages of $2,200 per day of delay beyond the required completion date (Stip. 3). The original contract called for appellant to begin work on 22 June 1989 and to complete the work on or before 19 October 1990 (R4, sec. 1, tab B).

The contract was for the completion of a partially constructed two-story building of approximately 55,000 square feet, a Vehicle Maintenance Training Facility of about 5,800 square feet, and various site improvements including an underground fire line (fire loop) around the perimeter of the main building. (R4, sec 1, tabs B, C)

The Government had previously contracted for the project with Harvesters Group (Harvesters), another small

business, and it had terminated that contract for default on 2 July 1987 (ex. A-231 at 8). Following that termination, due to the unavailability of funds, the building remained uncompleted until this contract. It was in a state of disrepair and deterioration, with evidence of animal droppings, vandalism, steel corrosion, and a heavy growth of brush (tr. 3/248).

The contract documents, which appellant received prior to negotiations, included an extensive Technical Supplement (TS), including a statement entitled "Project History - General Work Scope" which emphasized that there were many unknown conditions at the site. There were also included numerous photographs of the site and a detailed set of revised drawings, cross-referenced to the TS. (Exs. G-16, -17; tr. 8/174)

The "Project History - General Work Scope" included the following:

> Whenever testing is required by this Technical Supplement to confirm adequacy or acceptability of existing work and where no Unit prices are called for in new specification Section 01151 - Unit Prices contained in this Technical Supplement for extra work resulting from these tests, costs of this additional work, if any, will be negotiated with the Contracting Officer at such time as the full extent of the additional work, if any, is known. Costs for all testing required by the contract documents is to be included in the Contractor's Lump Sum price. (Emphasis in original)

The TS, at §01151, entitled "Unit Prices, Part I-General," included the following:

> . . . due to the current status of construction . . . the Government recognizes that certain items of work completed under the previous contract for construction are not verifiable until such time as certain specified testing is accomplished or until as yet incomplete work items are completed. In view of this, the Government is requesting that certain Unit Prices be submitted by the Contractor with his proposal for those work elements which are now identifiable as possible additional items of work under this contract. These Unit Prices will be reviewed and approved as appropriate by the Contracting officer should it become necessary to include the work covered by these Unit Prices.

(Ex. G-16)

The contract provided for a contractor's quality control system (CQC), which consisted of the quality inspection and control system established and carried out by the contractor to insure compliance with the contract drawings and specifications. It provided that the contractor conduct its own inspections, keep a written record of the results, obtain necessary approvals prior to custom fabrication and before delivery of materials and equipment to the project site, and stated that no actions of the Government's construction representative would relieve appellant of its responsibility under the clause. (Ex. G-16 at §01400-2, ¶¶ 2.1, 2.3, 4.1 and 4.2)

The contract, at §01011, ¶16, called for appellant to submit to the contracting officer for approval a progress chart, constituting a construction schedule and an equipment delivery schedule, with a requirement that the schedules be

updated with each invoice for progress payment (ex. G-16). The contract also included the FAR 52.236-15, "Schedules for Construction Contracts (APR 1984)" clause, which also provided for contractor schedules for the purpose of progress payments, and stated, in part:

> (b) . . . If, in the opinion of the Contracting Officer, the Contractor falls behind the approved schedule, the Contractor shall take steps necessary to improve its progress, including those that may be required by the Contracting officer, without additional cost to the Government. In this circumstance, the Contracting officer may require the Contractor to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, and to submit for approval any supplementary schedule or schedules in chart form as the Contracting Officer deems necessary to demonstrate how the approved rate of progress will be regained.
>
> (c) Failure of the Contractor to comply with the requirements of the Contracting Officer under this clause shall be grounds for a determination by the Contracting officer that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the default terms in this contract.

(Ex. G-16)

The contract included the FAR 52.222-6, "Davis Bacon Act (FEB 1988)" and FAR 52.222-13, "Compliance with Davis-Bacon and Related Act Regulations (FEB 1988)" clauses. It also incorporated the FAR 52.222-12, "Contract Termination - Debarment (FEB 1988)" clause, as follows:

> A breach of the contract clauses entitled *Davis Bacon Act, Contract Work Hours and Safety Standards Act--Overtime Compensation, Apprentices and Trainees, Payrolls and Basic Records, Compliance With Copeland Act Requirements, Subcontracts (Labor Standards), Compliance with Davis-Bacon and Related Act Regulations, or Certification of Eligibility* may be grounds for termination of the contract, and for debarment as a Contractor and a subcontractor as provided in 29 CFR 5.12.

(Ex. G-16)

Appellant is owned by Mr. Ernest Copeland and Mr. Manual del Campo. Mr. Copeland, appellant's Vice President and Treasurer, was the "lead' estimator for this project, although Mr. del Campo, appellant's President, took part in the preparation and negotiation of appellant's cost proposal. (Tr. 5/10, 8/175, 177-78)

Prior to commencing negotiations, Mr. Copeland and Mr. del Campo, although having previously visited the site, were taken on a formal walk-through of the site for three to four hours, during which the architect and engineer pointed out items to them (tr. 8/176-78). At the time of the initial walk-through, the floors were generally visible, but there was some ponding of water (tr. 7/188-90).

Negotiations for award of the contract took place in the spring of 1989. Representatives of the Navy's Resident

Officer In Charge of Construction (ROICC), including Lt. Patrick Gibbons, took part in the negotiations, and Ms. Brenda Shepard, a contract specialist at SOUTHDIV took the lead in the negotiations and participated by telephone (tr. 2/13, 5/11, 240).

Appellant's initial proposal to perform the contract totaled $4,547,248. Prior to negotiations, it increased its proposal to as high as $4,715,650 as a result of actual quotes it received in lieu of estimates. (Ex. A-313)

By letter of 10 April 1989, appellant submitted to SOUTHDIV's Ms. Shepard a list of its "qualifications and clarifications" for its proposal, which, it stated, was "contingent" on the items being accepted by the Government, but which, it also stated, it looked forward to discussing during negotiations. The Government did accept some of the qualifications, but there were some that it did not accept. (Tr. 10/110-11; ex. A-5)

On 12 April 1989, AEC submitted its revised proposal of $4,361,631 to reflect the negotiated price. The contract was awarded on 12 May 1989 and, as a result, the start of performance was to be 22 June 1989 with completion by 19 October 1990. (Exs. A-6, G-16)

The Navy assigned Lt. Gibbons as the project manager (PM), and he served in that capacity until July 1990. Commander Patrick Cahill was appointed as the ROICC, and he remained in that position until October 1990, at which point he was replaced in that position by Commander Glenn Cutler. The Navy's construction representative, or inspector, on the project was Mr. Mark Farrah. Mr. Kurt Musser was the Resident Engineer in Charge of Construction for the Orlando ROICC office and he was Lt. Gibbons' supervisor. (Stip. 18; tr. 1/38, 2/6, 7, 13, 15, 3/181, 314, 7/186)

Pursuant to the Miller Act, appellant was required to furnish payment and performance bonds for the project. The contract permitted appellant 40 days to do so prior to the

commencement of performance. Since this project exceeded AEC's normal bonding capacity, it attempted to obtain a bond from various sources, including possible joint ventures. It had a difficult time in arranging bonding. (Tr. 8/193)

The parties held a pre-construction conference on 20 June 1989, and AEC stated that it would have bonding in place by 26 June 1989. Following telephone communication between the parties, on 28 June 1989, CDR Cahill, the Navy ROICC, issued a cure notice to the effect that if appellant failed to secure bonding within 10 days the Government would consider terminating the contract for default. Appellant responded and described its efforts to obtain bonding and, by letter of 5 July 1989, indicated other things it was doing to prepare for performance and assured that it would complete performance by 19 October 1990. (Exs. A-11, -12) By letter of 11 August 1989, the Government again threatened default action (ex. A-14).

On 16 August 1989, appellant entered into an agreement (Agreement) with Kimmins Contracting Corp. (Kimmins) and Surety Specialists, Inc. (SSI), agents for Cumberland Casualty & Surety Company (Cumberland), in which SSI and Kimmins agreed to assist AEC in obtaining the required bonds in exchange for a bond premium of 7-1/2 percent of the contract price. AEC also agreed to permit Kimmins to oversee contract performance and to establish, together with Kimmins, a joint bank account, with a $200,000 "contingency," into which all progress payments would be deposited and released upon joint signature of both AEC and Kimmins for payment of direct job costs. AEC agreed to submit to the Government an irrevocable notice and directive that the Government make all payments under the contract directly into the joint bank account. The Agreement also provided that AEC, its principals and their spouses agreed to defend and indemnify Kimmins and SSI from and against all losses, claims and suits arising out of the

bonds or contract performance. The Agreement also included the following:

> 3. In compliance with the requirement of NAVFAC, AEC will employ a qualified individual acceptable to Kimmins as project Manager/Quality Control of the project to oversee and be responsible for the on-site performance of the project. AEC agrees to submit to Kimmins reasonably in advance of the commencement of work, a detailed statement containing the qualifications of the person AEC intends to employ as PM/CQ [sic]. AEC further agrees that it will not terminate or reassign the PM/QC without sending timely written notice of such action to Kimmins Contracting Corp.
>
> * * *
>
> 6. AEC shall at all times have the right and obligation to manage and direct the performance of the contract. Provided, however that if at any time during the progress of the work NAVFAC determines that AEC is not performing the work in a proper and prudent manner, or is failing in any manner to comply with any applicable provisions of the Contract, or is in any manner taking or failing to take actions which will cause claims or demands to be made against the Performance and payment Bond applicable to the Project, Kimmins and or [SSI] shall give AEC written notice indicating therein such improper, imprudent, or deficient performance, action or inaction. AEC shall

> have a period of five (5) days within which to undertake correction of same or to agree on acceptable corrective action. If AEC fails to take corrective action then Kimmins or [SSI] or the bonding company shall have the right to intervene and take whatever action is necessary to protect their interests under or related to the bond.
>
> * * *
>
> 15. AEC and Kimmins agree that this Agreement shall be subject to the formal approval of the Small Business Administration and NAVFAC and shall become effective only upon such approval.

(R4, sec. 1, tab D)

On the same date as the Agreement, Cumberland issued performance and payment bonds for the contract work (exs. A-18, -19). AEC and Cumberland also entered into a General Agreement of Indemnity (GAI) dated 15 August 1989. Among other things, the GAI provided the following:

> 11. In the event of any breach, delay or default asserted by the obligee in any said Bonds . . . the Surety shall have the right at its option and in its sole discretion and is hereby authorized with or without exercising any other right or option conferred upon it by law or the terms of this Agreement, to take possession of any part or all of the work under any contract or contracts covered by any Bonds . . . .

(Ex. A-15)

Mr. Joseph M. Williams signed the Agreement as Vice President of SSI (R4, sec. 1, tab D). On the same date as the Agreement, he signed the Power of Attorney accompanying the bonds as Cumberland's Senior Vice President, and he signed the reinsurance agreement attached to the bonds as Cumberland's Vice President. As of the end of May 1991, all of Cumberland's shares were owned by Kimmins Environmental Services Corporation, of which 70 percent was owned by Mr. Francis Williams, and administration of the company's affairs was performed by Mr. Francis Williams and Mr. Joseph M. Willams (ex. G-25). As of 1995, Mr. Joseph Williams was the President of Cumberland and was still an officer of SSI (tr. 4/429, 431). As of the date of the Agreement, Cumberland, Kimmins and SSI all shared the same address. (R4, sec. 1, tab B) At all times pertinent to the execution, performance and default termination of AEC's contract with the Navy, Kimmins and SSI served as agents for Cumberland to oversee and protect Cumberland's financial interest in the project (R4, sec. 2, tab K; tr. 5/175-76; ex. G-148(k))

Kimmins maintained individuals on the project to represent the bonding company's interest during the life of the contract (tr. 2/131). Those individuals served as project superintendents, one was an AEC employee, and two others had been Kimmins' employees, were selected by AEC with Kimmins' approval, but remained on the Kimmins' payroll to retain and protect their employee benefits. (Tr. 6/384-85; exs. G-41, -56, -93)

The record contains conflicting evidence regarding the extent to which SBA participated or assisted in the drafting of the language of the Agreement. Appellant's counsel at the time, through affidavit and testimony at hearing, stated that two former SBA officials, its contracting officer and regional counsel, in several meetings and other efforts at text revision, had helped him draft the Agreement, had concluded that the Agreement constituted nothing more

than a subcontracting agreement and surety agreement not designed to deprive appellant of control over the project, and had approved the Agreement even though they felt that the Agreement was one made in the normal course of business and did not require SBA approval. (Ex. A-335; tr.12/19-21, 27, 90, 124) The two SBA officials testified that, while it was possible that appellant's then counsel discussed the Agreement with them, they neither drafted nor approved the Agreement, that they had a firm policy against approving or suggesting language for third party agreements, and that, in their opinion, the Agreement was not merely a subcontractor or surety agreement and that it violated the SBA regulations (tr. 11/38-43, 53, 153-54, 173, 181). Based upon the record and observing the witnesses' testimony at trial, we find that, while appellant's counsel discussed the contents of the Agreement with the SBA officials, the Agreement was never formally submitted to SBA for approval, the SBA officials did not draft language used in the Agreement, and SBA and its officials neither formally nor informally approved the Agreement.

On 12 September 1989, Kimmins, by telecopier, forwarded the Agreement to the ROICC office in Orlando, addressed to the attention of CDR Cahill (ex. A-334; tr. 3/367). Although CDR Cahill had no recollection of having received the Agreement (tr. 3/405), Ms. Mary Steely (formerly Lundy), a contract specialist in the ROICC office, received it attached to appellant's Payment Request No. 1 (tr. 7/35), and it would likely have been given to CDR Cahill since he was the addressee (tr. 7/41). The Agreement was filed together with the payment request and would, therefore, been available for review by anyone in the ROICC office (tr. 7/42). Ms. Steely took note of the provisions of the Agreement, considered them to be unusual, but did not alert either CDR Cahill or legal counsel. She assumed that officials at SOUTHDIV were aware of the provisions of the Agreement. (Tr. 7/45-46, 53-58, 60-63)

The Navy withdrew its cure notice and issued Modification No. P00001 requiring the contract work to commence on 14 August 1989 and be completed by 12 December 1990 (R4, sec. 1, tab B).

Upon request by AEC to have progress payments deposited directly into the joint bank account, the Navy, by letter of 11 September 1989, provided AEC information to assist it in setting up the direct deposit. It advised AEC to send (a) a letter to the Navy Disbursing Office at Port Hueneme, California, authorizing that office to allow the Bank of America to accept AEC's check, and to include the name of the bank and account number to which the funds were to be transferred, (b) a letter to the Bank of America instructing that bank to transfer Navy disbursements to AEC's account, and to include the routing and numbers and an acknowledgment that there is a charge for each wire transfer, and (c) a copy of each of the letters to LT Gibbons and SOUTHDIV. The Navy also included copies of previous requests of that nature to aid appellant in preparing the required correspondence. (Ex. A-28) On 14 September 1989, AEC sent the letters to the Navy Disbursing office and to the Bank of America (exs. A-29, -30).

AEC prepared its performance schedule in the fall of 1989 with the assistance of Mr. George Robinson, a consultant who was formerly an employee of Kimmins. Mr. Robinson had extensive construction experience. The schedule was prepared using the critical path method (CPM). (Tr. 5/311-18, 6/8-9)

AEC paid SSI (a) $268,985.64 on or about 31 October 1989, and (b) $58,136.36 on or about 11 November 1989 for the performance and payment bonds (ex. G-2).

The AEC's and Kimmins' joint bank account was established through the Investment Management and Trust Division of Florida National Bank. The account yielded investment income which was not passed on to AEC. The

account statements were sent to both AEC's Controller and to Mr. Joseph Williams at Kimmins. (Ex. G-22)

During performance, the standard Navy procedure to process progress payment requests is for the Government's construction representative, or inspector, to walk through the job site with the contractor's superintendent and to agree upon the percentage of completion of the project's schedule of values (tr. 2/136-37, 3/334, 5/47-48, 8/225-26). On this project, the parties usually did not perform a joint walk-through (tr. 3/183, 295-96). Generally, Mr. Farrah, the Navy inspector, after receipt of an AEC invoice, would walk the job site alone, would take notes of AEC's progress in narrative form with no estimated percentages of completion, and would provide those notes to AEC. AEC would then forward its invoice to the ROICC office together with Mr. Farrah's comments, and LT. Gibbons or someone else from the ROICC office would confer with Mr. Farrah before arriving at a percentage of completion upon which to base a progress payment and affording AEC an opportunity to comment on that percentage. Mr. Farrah would not permit subcontractors to take part in a walk-through. (Tr. 3/296-97, 7/302)

LT Gibbons was responsible for deciding how much, if any, of the progress payment request to disallow, and about 75 percent of the time that decision was based on observations made during his own walk-through of the site within the previous two weeks, in addition to Mr. Farrah's written comments. (Tr. 3/184)

From October 1989 through October 1990, the Navy made the following disallowances of AEC's payment requests:

Req. No.	Amount Requested	Disallowance
2	$167,121	$ 6,443
3	567,778	172,877
4	382,780	48,474
6	553,716	141,168
7	495,135	157,467
8	398,373	216,249
9	363,599	164,824
10	457,947	192,277
12	129,642	23,198

(Ex. A-282)

The Navy's disallowances were made because AEC's progress payments requests allegedly (a) included items for which work had not been performed, (b) included amounts in excess of that compensable for material stored on site but not yet in place, and (c) included items which were not performed in accordance with the contract requirements. (Tr. 2/145-46, 148-49, 3/184-85, 187, 331-33, 7/229-30, 240-41)

By letter dated 24 January 1990, LT Gibbons advised appellant that some of its construction activities had fallen behind schedule, stated that he was concerned notwithstanding appellant's forecast of an early completion, and requested that appellant advise the Navy in writing of "any significant occurrences" which may cause it to fall behind its anticipated completion date. (R4, sec. 1, tab E) AEC responded by letter of 30 January 1990, in which it indicated that it was still optimistic for an early completion in August or September 1990, but warned that because of invoice reductions as a result of "ultra conservative" inspector Mr. Farrah, subcontractors were beginning to "slow down" their work (R4, sec. 1, tab F; tr. 5/52).

During 1990, appellant experienced problems with its subcontractors, including subcontractor performance problems, subcontractor defaults, and subcontractor notices of nonpayment, (exs. G-32, -40, -54, -55, -59, -60, -61, -63, -64, -150).

In a memorandum dated 16 April 1990, appellant's project manager notified the Navy that appellant "wished to accelerate the contract" and would be working on weekends when necessary. He also advised that appellant would "staff the project with a C.Q.C., Superintendent and project manager at all times when work is in progress" (ex. G-34).

By letter of 30 May 1990, LT Gibbons stated that the ROICC office was concerned with "numerous issues" which were "hampering contract management and perhaps job progress," and indicated the need for a meeting. Among the items listed were AEC's failure to correct construction compliance notices and subcontractor accusations of nonpayment. (R4, sec. 1, tab G)

Kimmins sent AEC an invoice in the amount of $5,000 for scheduling services performed by Kimmins for AEC. By letter to Kimmins of 29 May 1990, AEC stated that the amount charged was excessive and, "as a final attempt to resolve this dispute," AEC offered Kimmins $1,500 for all of the scheduling services until completion of the project. (Ex. G-46) Kimmins responded in a letter dated 4 June 1990. It rejected the AEC settlement offer, requested AEC to forward a check for the full amount of $5,000, and stated that Kimmins would "be pleased to provide [AEC] with the balance of scheduling services required" for the contract. (Ex. G-47)

The parties met on 3 July 1990 and, by letter of 10 July 1990, AEC's Mr. del Campo confirmed that he was making changes in the project management as a result of Navy dissatisfaction. The letter pointed out that appellant did not agree with the Navy's opinion of the previous AEC management, and further asserted appellant's problems with

Navy management. (R4, sec. 1, tab H) Mr. Copeland felt that the Navy's CDR Cahill had requested the management changes for personal reasons. (Tr. 5/73, 10/18) CDR Cahill bore no personal hostility toward either appellant or its principals or personnel (tr. 3/322-23).

By letter of 6 July 1990, AEC objected to Kimmins that the latter had not included AEC's overhead in its payment of AEC's draw request for May 1990 and that Kimmins had based that deduction on Kimmins' assessment that the project was behind schedule, an assessment with which AEC stated that it disagreed. AEC further stated that it considered the Kimmins' unilateral decision to withhold part of the draw, if it were to recur, to be a breach of contract. (Ex. G-49)

In a letter dated 16 July 1990, Kimmins cited a number of lawsuits and notices of non-payments filed against Cumberland on the project, and stated that Cumberland was "very nervous" about that situation and the fact that AEC was "making monthly payments to the Subs and Vendors in excess of [AEC's] billings to the Navy." Calling this "a signal of a dangerous financial problem ahead," Kimmins asked AEC for a complete audit of the project and an update of the status of the lawsuits, and stated that the May overhead payment would be withheld until Kimmins received the updates. (Ex. G-51)

During July 1990, CDR Cahill retired, LT Gibbons was reassigned elsewhere, and Mr. Musser took over as the Navy's project manager to maintain continuity on the project. Beginning the following month, Navy disallowances of AEC payment requests were "nominal." (Tr. 2/14-15, 3/391) The Navy attributed the decrease to the change in AEC's project manager; AEC attributed the improvement to the change in Navy personnel assigned to the project.

By bilateral contract modifications, the contract completion date was extended to 23 December 1990 (R4, Sec. 1, tab B; tr. 1/118-22).

When Mr. Musser became the Navy's project manager in July 1990, he was concerned about the pace of AEC's performance, although he did not perform a written schedule analysis (tr. 2/215, 3/22). By letter to AEC of 1 August 1990, Mr. Musser warned that, although AEC's schedule indicated that it would complete performance a week before the scheduled completion date, AEC had completed "very few" of its activities within its "planned durations," and any delay to critical path items could result in performance beyond the completion date and the imposition of liquidated damages (R4, Sec. 1, tab I). Appellant responded by letter of 9 August 1990, stating, among other things, that, although it was concerned with the consumption of the float time in its schedule, it was pursuing the project vigorously and was confident of a timely completion if the parties could work together to resolve outstanding issues (R4, Sec. 1, tab J).

On 19 September 1990, Mr. Musser sent AEC a letter advising that, based on appellant's 10 September 1990 progress schedule, it appeared that AEC was 102 days behind schedule and would not be able to complete performance until approximately 1 February 1991. He again warned of potential liquidated damages and directed appellant to provide a "plan" on how it intended "to adjust [its] performance in order to finish by the contract completion date." (R4, sec. 1, tab K) Although Mr. Musser was fairly confident that appellant would not complete work by 23 December 1990, the Navy did not issue an acceleration order or an official cure notice (tr. 2/222). The user of the facility did not express to Mr. Musser any sense of urgency with regard for needing the new facility, so Mr. Musser did not consider terminating the contract for either default or convenience and saw no problem in AEC performing until

February 1991. AEC was making some progress, the Navy accepted the benefit of the work and encouraged AEC to continue performance. (Tr. 2/224-26)

By letter to appellant dated 24 October 1990, Mr. Musser summarized previous discussions and advised appellant that, based on its progress schedule of 15 October 1990, appellant was 99 days behind schedule and that, without working on holidays or weekends, it would complete performance on 6 March 1991. He further wrote that, although appellant had represented that it had a bar chart to reflect a plan to complete performance by 23 December 1990, as a result of a job "walkthrough" by Navy and AEC personnel, the ROICC had suggested that AEC prepare a realistic bar chart to reflect remaining performance activities with realistic completion dates, which the ROICC would compare to performance every two weeks. The letter also stated that "AEC's failure to maintain the revised schedule would result in the retention of potential liquidated damages on future invoices." (R4, sec. 1, tab L) At that time, Mr. Musser's opinion was that there was a good chance that appellant could not complete performance by 6 March 1991, but he did not order appellant to accelerate performance and did not issue a show cause order or consider terminating the contract for default (tr. 2/228, 230-32).

CDR Cutler became the ROICC in October 1990, and it was his opinion that AEC's rate of progress from that point to the end-of the year was significantly slower than he had observed on other projects of a similar dollar value (tr. 1/40).

Although the Navy's inspector, Mr. Farrah, indicated on appellant's Progress Payment Requests Nos. 12 and 13, for work performed through 31 October 1990, that AEC was behind schedule, the Navy did not withhold a retention for failure to make progress (ex. A-282).

The procedure established for direct deposit of progress payments from the Navy, through the Bank of America, into the joint bank account was carried out,

apparently with no significant problems, until November 1990 (tr. 4/408). On or about 7 November 1990, the Bank of America attempted to transfer $106,414 to the joint custodial account, but was advised that the account number of that account was no longer viable because the Florida National Bank had merged with the First Union Bank. Thereafter, an employee of the Bank of America called AEC, spoke to an employee of AEC, who mistakenly provided the account number of the AEC regular corporate account rather than the joint bank account. As a result, the Bank of America wired the funds to AEC's regular corporate account. (Tr. 5/220-23, 9/10-11; ex. G-27)

Upon discovery that the funds had been placed in the wrong bank account, AEC did not transfer them to the joint bank account. Rather, it stated that it used the funds to pay overhead on this contract. However, since the funds were never placed into the joint bank account, Kimmins and Cumberland did not accept appellant's explanation that the funds were misdirected by innocent error, and they accused AEC of stealing the funds. AEC felt that it had provided adequate documentation that it had expended the funds on this contract. (Tr. 5/220, 223, 9/10-11)

During the time period from the end of November 1990 into January 1991, the Navy issued unilateral change orders for additional work, which increased the contract price and stated that the adjustment was "pending negotiation for time and money." That additional work included electrical work. (R4, sec. 1, tab B)

The parties met at the site on 6 December 1990 and discussed the items of work which remained to be performed. CDR Cutler, the Navy ROICC, understood from the discussion that contract performance could extend into April 1991, and asked AEC to document any requests for time extensions. In discussing the apparently less than full effort by some subcontractors, Mr. del Campo blamed delays in payment to subcontractors due to delays by the bonding

company. That meeting was the first time that the ROICC became aware that AEC was having financial difficulties on the project. (R4, sec. 1, tab Q; tr. 2/101-02)

By letter to the ROICC dated 19 December 1990, appellant presented a "preliminary" list of items in which "time extensions appear to be warranted" (R4, sec. 1, tab N).

On 27 December 1990, the ROICC responded to the 19 December 1990 letter and stated that AEC's letter did not provide documentation for the time extension request. The ROICC further stated that, since AEC had passed the contract completion date, "potential liquidated damages" for 15 days "will be held on [AEC's] current invoice," and that AEC's failure to provide substantiation for requested time extensions by the next invoice would result in "additional potential liquidated damages being held." (R4, sec. 1, tab O)

By letter of 31 December 1990, CDR Cutler issued AEC an order to show cause why the contract should not be terminated for default. The letter cited the passage of the 23 December 1990 contract completion date, AEC's slow progress, its workforce level, and its "less than satisfactory on-site management and less than acceptable quality of workmanship." (R4, sec. 1, tab P)

Appellant responded to the show cause order by letter dated 10 January 1991. It confirmed a telephone conversation with CDR Cutler in which the parties agreed to meet on 23 January 1991, at which time AEC would present a revised CPM schedule establishing a new completion date and indicating how AEC was delayed through no fault of its own. (R4, sec. 1, tab R)

AEC requested Kimmins to perform the schedule analysis and Kimmins hired Mr. George Robinson, a consultant and former Kimmins employee who had prepared AEC's original schedule, to travel to the site to accomplish the task. Mr. Robinson, who had extensive experience in construction estimating and scheduling, spent three weeks at the site and expended 200 hours in the analysis. He

observed the site, examined the drawings and specifications and other contract documents and correspondence. He interviewed AEC, Navy and subcontractor personnel. His analysis, known as a CPM "time impact analysis," consisted of an examination of events under the contract in three-month segments, and he concluded that there had been substantial Government caused delay and, as a result of those delays, he forecast completion of the contract on 16 April 1991. (R4, sec. 1, tabs S and T; tr. 3/333-36, 5/311-60)

AEC, by letters dated 22 January 1991, forwarded the Robinson analysis to the Navy in advance of the meeting and requested a contract time extension until 16 April 1991. (R4, sec. 1, tabs S and T)

The parties, as well as Cumberland and SBA representatives, met on 23 January 1991 and Mr. Robinson presented his analysis. The Navy, which did not have an opportunity to review the Robinson analysis in depth before the meeting, noted that it reflected only delays allegedly due to Government responsible causes, and asked AEC to submit documentation in support of the conclusions of Government caused delay. AEC stated that it would do so.

Appellant's presentation at the 23 January 1991 meeting indicated to the Navy that appellant anticipated being able to complete the project by 16 April 1991, but the Navy realized that contract modifications issued subsequently could affect appellant's forecast for completion. In fact, CDR Cutler advised appellant that a modification involving additional telephone and electrical receptacles would be issued and would include a time extension; the Navy unilaterally issued Modification No. A00029 on the same date to accomplish that additional work. (R4, sec. 1, tabs B, W; tr. 1/146-51, 2/263-64)

Also at the 23 January 1991 meeting, Cumberland stated that its primary goal was to see AEC complete the contract and requested that the Navy not withhold liquidated damages. CDR Cutler asked the bonding company to

provide the ROICC with a letter indemnifying AEC for the Navy not to withhold "potential liquidated damages on all future progress payments." Cumberland agreed to pay some of AEC's suppliers and subcontractors and the ROICC agreed not to assess liquidated damages at that time. The Navy made annotations on AEC's invoices that liquidated damages were not being withheld due to the agreement. CDR Cutler stated that, if progress continued to slip and/or the project finished late, he reserved the right to later assess liquidated damages and the surety also reserved its rights. At the close of the meeting, AEC reaffirmed its commitment to complete the contract and, in anticipation of the next "invoice walk through" scheduled for 12 February 1991, the parties agreed to conduct a "joint progress walk through" in the afternoon of 11 February 1991. (R4, sec. 1, tabs W, Y; tr. 1/47; exs. A-187, -282)

While CDR Cutler understood that AEC was forecasting 16 April 1991 as the completion date and he felt that it was a reasonable prediction with the utilization of a full work force (tr. 1/50-51), the Navy did not issue a contract modification formally establishing 16 April 1991 as the contract completion date.

By letter of 31 January 1991, AEC submitted to the ROICC additional information regarding the fire loop, storefront, and cold water insulation issues which, it had alleged, contributed to the project delay. AEC also stated that further information was forthcoming (R4, sec. 1, tab V). The ROICC responded by letter of 20 February 1991, requesting appellant to provide a date by which it would submit documentation on the other "delay issues." He stated, further, that his office would not be providing a response to the delay issues until all of the documentation for all issues was received. (R4, sec. 1, tab Z)

In late January and early February 1991, there was a disagreement between AEC and Cumberland regarding payments owed to subcontractors and whether there was

money available in the joint bank account to pay them. Cumberland also took the position that it was not responsible for providing AEC with CPM scheduling services and that it was therefore also not responsible for delays in payments from the Navy resulting from the absence of such schedules. (Exs. G-69, -72, -73, -74, -75, -76, -78, -79, -86, -87)

During the same time period, AEC, Cumberland and the Navy received letters regarding alleged nonpayment of subcontractors (exs. G-68, -81, -150).

Appellant continued to perform work during February 1991, although the crew sizes of subcontractors were at somewhat lower levels than they had been previously (exs. A-283 -284, G-4, -13).

On 5 February 1991, AEC gave the Navy a revised schedule based on its CPM analysis projecting completion of the project on 26 April 1991 (ex. A-285).

On 8 February 1991, the Navy's Mr. Musser provided AEC a proposed agenda for the scheduled meetings on 11 and 12 February 1991. The schedule included time to negotiate contract modifications. (Ex. G-80)

On 11 February 1991, the ROICC and representatives of AEC and Kimmins walked through the job site and the parties met on the following day. They discussed various work items and CDR Cutler stated that contract modifications, including time extensions, were being prepared and would be issued shortly. (Tr. 6/342; ex. G-83)

By letter to AEC of 15 February 1991, Kimmins stated that the $106,000 which had been placed in AEC's general corporate account rather than the joint bank account was not an advance by the Navy and was not used to pay costs associated with this project. The letter referred to the matter as appellant's "diversion of funds" and stated:

> The Kimmins Contracting Corp. expects the AEC Corporation to repay in full the $106,000.00 which the AEC Corporation directed the Navy to fund directly into their account, bypassing the joint escrow account.

(Ex. G-85)

By letter of 22 February 1991, a copy of which was sent to Cumberland, CDR Cutler advised AEC that, as a result of the parties' meeting on 23 January 1991 and their 11 February 1991 job walk-through, he had decided "not to continue termination for default proceedings." The letter also stated:

> Our office will closely monitor your progress based on the revised schedule provided to us in February. Your failure to maintain satisfactory progress may result in a decision to reinitiate default proceedings.

(R4, sec. 2, tab A)

At that time, CDR Cutler had focused on 26 April 1991 as a realistic contract completion date (tr. 1/165-66).

The parties, along with Mr. Joseph Williams, representing Cumberland, met at the site on 4 and 5 March 1991. On the latter date, CDR Cutler asked why progress on the job was slow. AEC's Mr. del Campo replied that money and other factors were delaying the project. CDR Cutler stated that AEC was "close to being defaulted," and Mr. del Campo stated that AEC might not be able to absorb the losses on the project. Mr. del Campo also complained about Kimmins' refusal to release funds. Mr. Williams replied that

AEC had failed to provide the proper paperwork to Kimmins. (R4, sec. 2, tab C) CDR Cutler's statement that AEC was close to being defaulted was intended to get AEC's attention and to get AEC and the bonding company to work together to complete the project (tr. 1/173-74).

Upon hearing that CDR Cutler had stated that AEC was "close to being defaulted," Mr. Williams reported it to Kimmins' Mr. Mackowiak and, on 6 March 1991, both men telephoned CDR Cutler to confirm that CDR Cutler had been serious when he made the statement. Mr. Mackowiak indicated that a default termination would be "unconscionable," especially in view of the pending contract modifications, and CDR Cutler responded that a default termination was only a potential action under consideration. (Tr. 6/345-47)

During March 1991, AEC traded a substantial number of acrimonious and accusatory letters with Kimmins, Cumberland and SSI. Among the issues in which they disagreed were (a) the placement of the $106,000 into the wrong bank account, (b) whether Kimmins was wrongfully withholding money owed to subcontractors, (c) whether AEC owed Kimmins for the salary of its project manager, and (d) whether Kimmins was interfering with AEC's performance. Among other things, SSI alleged that AEC had breached the Agreement and was in a position of default in the contract with the Navy, and it threatened to intervene and to take over contract performance. (R4, sec. 2, tabs, D, F, H; exs. G-93 to -98, -102, -103, -108, -109, -110, -113, -114, -117 to -119) AEC requested ROICC assistance in resolving those disputes, but the Navy position was that the matter was one between AEC and the surety (R4, sec. 2, tabs E, G).

By letter of 20 March 1991, CDR Cutler wrote to AEC, as follows:

> As a result of the show cause meeting on 23 January, 1991 and subsequent job site walk through on 11 February, I informed you that I would not continue to pursue termination for default. My decision was based upon assurances from you that you would diligently pursue the completion of the contract with a revised completion date of 27 April, 1991.
>
> After more than 30 days, work in place continues to progress at a dangerously low pace. Productivity, measured by the number of work force man-hours, has decreased from approximately 150 to less than 100 man-hours a day. At that rate, you will not be able to complete the contract by 27 April 1991.
>
> You are notified that the government considers your failure to diligently pursue completion a condition that is endangering performance of the contract in accordance with its terms. Therefore, unless such a condition is cured within 10 days receipt of this letter [sic], the government may terminate you for default in accordance with FAR clause 52.249-10, default (Fixed Price Construction).

The Navy sent a copy of the letter to Cumberland and to the SBA. (R4, sec. 2, tab I)

By letter of 26 March 1991 to the ROICC office, appellant submitted a proposal to perform additional clearing and grubbing that had been requested by the Navy; the Navy had requested a "bottom line cost." The amount of the proposal was $32,833 and no additional performance time was requested. (Ex. A-219)

In January through March 1991, appellant's total employee and subcontractor work days were 703 in January, 436 in February, and 377 in March (ex. G-4).

By Modification No. A00032, signed by AEC on 27 March 1991 and by the Navy on 5 April 1991, the contract price was increased for the work necessary to insulate cold water lines, and the contract completion date was extended from 23 December 1990 to and including 22 January 1991 (R4, sec. 1, tab B).

On or about 1 April 1991, AEC filed suit in Florida against Kimmins, Cumberland and SSI (ex. G-148(k)).

On 2 April 1991, appellant wrote to one of its subcontractors in response to its requests for payment, and attributed AEC's possible inability to pay to its disagreement with Kimmins regarding the availability of funds in the joint bank account. AEC reminded the subcontractor of its rights under the Miller Act to recover funds, and advised that its "bonding company agent" was SSI. (Ex. G-120)

On 3 April 1991, AEC wrote to Kimmins, advised that if Kimmins "would release a portion of the retainage funds . . . the total money owed to subcontractors could be paid," and that Kimmins' refusal to allow AEC to use that money was "not in line with construction industry practice." The letter advised Kimmins that it had "seriously damaged the progress of this project and brought [AEC] to the brink of default." (R4, sec. 2, tab L)

On 3 April 1991, appellant wrote another letter to Kimmins, stated that it took exception to most, if not all the points raised by Kimmins in its "latest battery of letters," which "distort[ed] the facts and misrepresent[ed] the truth, and advised that AEC would "feel more comfortable if Kimmins directed all future correspondence to AEC's attorney at the time (ex. G-121).

On 3 April 1991, AEC replied to the Navy's "cure notice" of 20 March 1991. AEC stated that, following the parties' meeting of 23 January 1991, it appeared "quite

reasonable" that the project could be completed by 27 April 1991, but that "the many changes and delays caused by the Government have made an April completion impossible." Appellant also cited interference and "financial blackmail" by Kimmins and Cumberland, and stated that "unless both Kimmins and Cumberland Casualty restrain from their present conduct and release the funds currently in said bank account, it is doubtful that AEC will ever be able to complete the project." AEC strongly urged the Navy to exert its influence to obtain a release of the funds. (R4, sec. 2, tab N) CDR Cutler understood from the letter that AEC wanted to complete the contract, but was unable to predict by when it could do so (tr. 1/192).

By letter of 4 April 1991, CDR Cutler responded to AEC's 3 April 1991 letter. He stated that he was unable to evaluate appellant's allegation, which CDR Cutler called "vague" and "not substantiated" that "the many changes and delays" caused by the Navy made it impossible to complete the project in April. He directed appellant to provide a detailed response to substantiate the allegation by noon on 5 April 1991. He continued:

> In addition, my letter of 20 March 1991 requires that you cure the dangerously slow work pace within 10 days. You have not addressed this in your response. I strongly encourage you to address this issue.

(R4, sec. 2, tab O)

Appellant responded by letter of 5 April 1991, indicated that it did not understand CDR Cutler's failure to comprehend its response to the cure notice since the message was "clear," and it restated its position. It stated that it could not cure the deficiency stated in the cure notice because of

Kimmins' and Cumberland's restrictions on the disbursement of funds from the joint account, that it could not "give any assurance as to when the project will be completed," and that the resultant "financial strain" was "aggravated by costs incurred as a result of delays and additional work caused by the government." Appellant continued:

> Your latest letter requests substantiation of this last point; however, due to the time constraints, we refer you to correspondence which we sent you in preparation for our meeting of January 23, 1991. Although some issues mentioned in that correspondence have been resolved others remain (most significant of which is the fire loop). We do not know the full impact of this delay and cannot, at this time, prepare a complete claim package for you. We have reserved our rights on this issue and will formulate a claim position as provided under the FAR once the full impact of the delay is known.

(R4, sec. 2, tab Q)

CDR Cutler understood that appellant was contending that Government actions had affected its performance schedule and that the delays referred to were generally the same as appellant had alleged in its letter of 19 December 1990 (tr. 1/155-58, 197-98).

On 5 April 1991, appellant also sent another letter, as follows, to CDR Cutler:

> This is to inform you that AEC Corporation has been forced to reduce our work force at the referenced facility to the CQC and the superintendent. We cannot continue to incur costs on this project given the financial restrictions being imposed on us by [Kimmins] and [Cumberland]. Specifically, Kimmins and Cumberland have refused to release any funds to AEC Corporation to cover our direct job costs for the last two months.
>
> We regret this action, but find that we have no other option. We request, again, that you use whatever influence you may have with Kimmins and/or Cumberland to persuade them to release the funds available in the joint escrow account.

A copy of the letter was sent to Cumberland, Kimmins and the SBA. (R4, sec. 2, tab P)

Upon receipt of appellant's 5 April 1991 letters, CDR Cutler was of the opinion that there was not much hope remaining that appellant could complete the contract, and it appeared to him that the Navy would "have to continue through the default process" (tr. 1/77). At that time, the personnel in the ROICC office were of the opinion that appellant was doing no further productive work (tr. 7/110-16). However, the Navy never performed either a written schedule analysis to determine by when appellant could complete the contract or a financial analysis to ascertain the means it required to do so (tr. 1/219-20, 3/123).

On 5 April 1991, Mr. Farrah, the Navy's construction representative, arrived at the site and was told by appellant's CQC that AEC's Mr. del Campo and Mr. Copeland had taken as-built drawings, the submittal and correspondence

files and equipment, including the copy and FAX machines, from the AEC trailer office at the site. Mr. Farrah advised the CQC to write a letter to AEC demanding the return of the submittals and as-built drawings. By FAX of the same date, the CQC advised Mr. del Campo that, in order to perform his quality control work, he required the documents and equipment which had been removed from the site. Mr. Farrah informed Mr. Musser, the Navy's Resident Engineer, of the events, and appellant's CQC similarly advised Kimmins of what had occurred. (Exs. A-283, -284, G-23, -122)

On 8 April 1991, AEC disconnected its telephone at the site, but returned to the site its submittal files, correspondence files and one set of as-built drawings. It did not return the FAX or copying machine. (Tr. 7/258; exs. A-283, 284, G-23)

In preparation for a scheduled meeting between the parties which was scheduled to occur on 9 April 1991, CDR Cutler had Mr. Musser prepare a "show cause" letter to be handed to appellant at the meeting. It was prepared in advance in the event that appellant would not be able to provide information at the meeting to indicate that it had cured the condition identified by the Navy's 20 March 1991 letter. In that way, lacking assurances that appellant could complete the contract, the Navy could "move to the next stage" and "speed up the process" to terminate appellant for default. (Tr. 1/91, 7/261-62)

Prior to the 9 April 1991 meeting, AEC's Mr. del Campo was under the impression that it was to be a progress meeting and had no idea of the scope of the meeting and of its attendees. The attendees at the meeting included (a) Mr. del Campo, (b) AEC's CQC, (c) CDR Cutler, Mr. Musser and Mr. Farrah from the ROICC's office, (d) Mr. Mackowiak from Kimmins and Mr. Williams representing Cumberland, (e) a representative from the SBA, (f) representatives from the user of the facility, and (g)

representatives from the Navy's SOUTHDIV, including the contracting officer, Mr. Andrew Demos. (Tr. 8/299)

CDR Cutler began the meeting by informing AEC that certain adhesive it used in performance was not in compliance with the Buy American Act and was required to be removed. He raised the issue of the documents removed from the site and the disconnected telephone, and Mr. del Campo responded that the documents were returned, that the telephone had been disconnected accidentally when a CQC telephone was disconnected, and that he would have telephone service restored. (Ex. A-230)

At the meeting, the parties discussed and agreed upon the percentages in connection with work completed in March 1991 and discussed AEC's performance schedule. Mr. del Campo indicated that he was unable to address the performance schedule or to indicate by when AEC would complete work because of the monetary constraints placed upon the company. CDR Cutler stated that the "current [contract] completion date based on all known modifications would be 3 March 1991," but, with the "weeks of work" still required, he discussed a 7 June 1991 actual completion date. He inquired whether Cumberland would provide indemnification for "potential liquidated damages," which the Navy would have to hold absent an indemnification agreement, for the additional performance time to the 7 June 1991 date. Mr. Williams of Cumberland, confused because there was no "contractual" completion date set at that point, responded that he would have to obtain the advice of counsel. (Tr. 3/107, 110, 112-14, 6/355-57, 8/151-52, 305; ex. A-230)

During the 9 April 1991 meeting, CDR Cutler attempted to finalize a change order request for additional clearing and grubbing that was not included in the work scope of the original contract. CDR Cutler stated that all the Government could offer was $25,000 plus a 55-day time extension and advised AEC to consider the issue of

liquidated damages in deciding whether to accept that offer. AEC did not agree to do the work at that price. (Tr. 6/203, 353; ex. A-230)

During the 9 April 1991 meeting, AEC contended that the fire loop repair remained an issue delaying the contract. CDR Cutler responded that the fire loop issue had been resolved on 8 March 1991 when the Navy accepted the pressure test and that the Navy was still awaiting a detailed cost breakdown from appellant. (Ex. A-230)

During the 9 April 1991 meeting, the parties discussed appellant's financial difficulties, and the Navy officials were aware that appellant was experiencing a cash flow problem. Cumberland indicated that, while it was not restraining appellant from meeting its financial commitments, the joint bank account was not available because of a a State required retention for subcontractors. The Navy did not ask AEC, Cumberland or Kimmins for an estimate of how long it would take them to resolve their dispute regarding the $200,000 retention, nor did the Navy give them a deadline by which to resolve the dispute. CDR Cutler did not ask appellant whether the release of the Government retention (at that time $52,000) and an infusion of cash within a certain period of time would enable the company to complete performance, nor did the Navy perform any written schedule or financial analysis in an attempt to ascertain that information. No one at the meeting asked AEC whether it would perform the remainder of the work under the contract and AEC never said it would not complete performance; the matter discussed was when it would do so (tr. 1/189, 219-220, 225, 3/108-09, 116-18, 5/263, 6/207, 209, 358, 8/304-07; ex. A-230).

At the conclusion of the 9 April 1991 meeting, CDR Cutler gave Mr. del Campo the letter he had prepared a day earlier and Mr. del Campo signed a copy acknowledging receipt. A copy of the letter was also given to the other attendees at the meeting. (Ex. A-230) The letter given to

Mr. del Campo had not been signed by CDR Cutler (R4, sec. 2, tab R; tr. 8/312); it was, therefore, not official at that time (tr. 1/207-08). AEC received a signed copy of the letter on 11 April 1991 (ex. A-227). The 10-day period computed from 11 April 1991 ended on 21 April 1991, which was a Sunday.

The letter referred to the 23 January 1991 meeting, the 11 February 1991 walk-through, the Navy's "cure letter" of 23 March 1991, and AEC's letter of 5 April 1991 in which it indicated that it was unable to cure the deficiency. The letter continued:

> Since you have failed to cure the conditions endangering your performance under [the contract] as described to you in the Government's letter of 20 March 1991, the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose out of causes beyond your control and without fault and negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to [CDR Cutler] within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.

> Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

(Ex. A-227) During the 9 April 1991 meeting, prior to delivery of the letter, there had been no mention of a possible default termination, and no discussion followed its delivery (tr. 4/396, 6/361, 8/301; ex. A-230).

Following the general meeting on 9 April 1991, CDR Cutler asked Kimmins' Mr. Mackowiak and Cumberland's Mr. Williams to stay for another meeting with just the three men in attendance (tr. 4/396, 6/361). He told them that it was the Navy's intent to terminate the contract with AEC for default and asked whether Cumberland would complete the work following the default termination. Mr. Willams responded in the affirmative and CDR Cutler told him that he would send Cumberland a copy of a sample takeover agreement within a few days. Mr. Williams also told CDR Cutler that Cumberland had made offers to AEC to enable it to complete the contract. Those offers, presented in the alternative and with conditions attached, included Cumberland's injection of $250,000 into the project, a loan of that amount with collateral and personal notes signed by the AEC owners and their spouses, and Cumberland taking control over the project with the owners and their spouses signing notes to cover any shortfall. Mr. Williams reported that AEC had neither accepted any of the offers nor had made a counter-offer other than to have Cumberland place more funds into the project and permit AEC to retain control without its owners signing personal notes, and that Cumberland had refused to advance funds on that basis.

CDR Cutler asked how much time would be required to complete performance, and Mr. Mackowiak of Kimmins replied that he would have to review the schedule before committing to a completion date. (Ex. A-228) Shortly after the second meeting, Mr. Williams advised Mr. del Campo that the Navy was going to terminate AEC for default (tr. 8/314).

On or about 9 April 1991, CDR Cutler requested that his staff begin to prepare a recommendation to SOUTHDIV to terminate the contract for default (tr. 1/213). On or about 10 April 1991, Mr. Demos, the contracting officer, obtained from NAVFAC the authority to terminate AEC for default (tr. 5/252; ex. A-281).

On 10 April 1991, AEC wrote to Kimmins advising that the Navy had erroneously wired another progress payment to AEC's general corporate account and that AEC had transferred the funds to the joint bank account (ex. G-124).

On 11 April 1991, an attorney for a subcontractor under the contract wrote to AEC demanding immediate payment of funds due under the contract and also demanding a copy of AEC's surety bond (ex. G-125).

On 11 April 1991, the Navy's SOUTHDIV sent Cumberland a draft takeover agreement. The cover letter indicated that a default termination was "anticipated" being issued to AEC on or about 20 April 1991 "due to the contractor's failure to pursue the completion of work," and asked Cumberland for its "plan of action." A copy of the letter was sent to the ROICC office. (Tr. 5/277; ex. A-332)

By letter of 12 April 1991, AEC advised the SBA of the Cumberland conditional offers. AEC explained to the SBA that it could not agree to the Cumberland conditions, but that it had made its own offer which had been turned down by Cumberland. (Ex. G-128)

In a letter of 16 April 1991, Mr. Williams, on SSI letterhead, wrote to CDR Cutler, advised that SSI took

exception to AEC's allegations of 5 April 1991 regarding the disbursement of funds, and continued:

> All available funds have been disbursed to subcontractors and vendors who have performed labor and supplied materials on the above referenced project pursuant to subcontractor requisitions.
>
> To our knowledge, there are not currently any funds available for release from the escrow account.

(Ex. G-130)

The contract's daily reports reflect, and we find, the following total workday staffing by AEC and subcontractors performing productive work on the project during April 1991:

April 1 --- 17
2 --- 11
3 --- 19
4 --- 23
5 --- 18
6 --- 6
8 --- 9
9 --- 10
10 --- 10
11 --- 9
12 --- 4
14 --- 4
15 --- 3
16 --- 3
17 --- 5

The final daily report was for 17 April 1991, but AEC and some subcontractors were at the site through at least part of 22 April 1991, the date of the default termination (tr. 7/327-29; ex. G-4).

On 17 April 1991, the Navy unilaterally issued a number of contract modifications in order to "tie up loose ends" prior to terminating the contract for default (tr. 7/139). One of those modifications was a deductive change for the roof plywood and another, Modification No. A00033, reduced the amount paid for electrical receptacles and extended the contract completion date from 22 January 1991 to 3 March 1991 (R4, sec. 1, tab B).

On 18 April 1991, the ROICC sent the SOUTHDIV contracting officer, Mr. Demos, a memorandum prepared by the Navy's Mr. Musser. The memorandum, which was accompanied by supporting material, requested that the contract be terminated for default "as the contractor has failed to maintain satisfactory progress and has indicated that the current lack of performance cannot be completed [sic]." Mr. Musser admitted that the second part of the sentence does not make sense (tr. 3/128-29). The memorandum indicated that AEC was 87 percent complete overall, 98 percent complete on drywall, 98 percent complete on electrical, 95 percent complete on HVAC, 95 percent complete on underground utilities, and 90 percent complete on plumbing, the building's major systems. It represented to the contracting officer that there were no labor violations at that time.

All of the factors upon which the Navy relied in terminating the contract for default were set forth in the written recommendation to terminate (tr. 3/130, 7/134-35). It did not highlight the fact that the 3 March 1991 completion date had been set retroactively and, despite appellant's earlier allegations and presentation alleging multiple causes of Government responsible delay, the memorandum cited only

the fire loop as a cause of delay alleged by appellant. The SOUTHDIV contracting officer relied upon the ROICC to review and analyze any claims of Government-caused delay (tr. 5/270-71). (Ex. A-231)

The memorandum indicated that there was no known "special military or other urgency" concerning the project. A section discussing factors considered in determining whether to terminate the contract included the following:

> This contract is a reprocurement of a defaulted contract that was allowed to sit partially constructed for a couple of years due to nonavailability of funds. The large increase in reprocurement was a result of the state of disrepair, deterioration, and site unknowns at the time of award of the reprocurement contract. The urgency of this action is predicated on prevention of another deterioration for reprocurement as well as community public relations that may suffer as a result of a second default.

(Ex. A-231 at 20)

The memorandum recommended that reprocurement be accomplished "by means of a Surety-Takeover Agreement" with Cumberland. It represented that it would take eight weeks for the surety to complete the project following the takeover. That representation was not based upon any analysis of how long it would take to complete the remaining 13 percent of the work. Mr. Musser claimed that he had obtained the estimate from the surety, and simply included it in the recommendation to the contracting officer even though he considered it to be overly optimistic. (Tr. 3/136-38; ex. A-231)

On 19 April 1991, Mr. Williams, on SSI letterhead, wrote another letter to CDR Cutler which was very similar to his letter of 16 April 1991, except that it stated that SSI was taking no position on AEC's potential claims against the Navy and that AEC's "repeated attempts to make use of subcontractors retention monies currently held in the escrow account for purposes other than payment to vendors and subcontractors" was a violation of Florida law (ex. G-134).

At the close of business on 19 April 1991, ROICC's Mr. Musser notified NAVFAC that appellant had not responded to the Navy's show cause letter dated 8 April 1991 within the requisite 10 days. In doing so, he calculated the 10 days from the hand delivery of the letter at the meeting of 9 April 1991. (Ex. A-230)

By contract Modification No. P00037 dated 22 April 1991, Mr. Demos, the SOUTHDIV contracting officer, issued a decision terminating the contract for default effective that date "due to failure to make progress in the work and for default in performance." Appellant received the contracting officer's decision on the same day. (R4, sec. 2, tab S) In issuing his decision, the contracting officer was under the impression that appellant had not responded to the show cause letter within the 10-day period (tr. 5/274; ex. A-281). He also took into consideration the fact that AEC had no other contracts within SOUTHDIV and that AEC was "not essential to the Government Acquisition Program" (ex. A-281).

By letter of 22 April 1991, AEC responded to the show cause letter, which, it stated, it had received on 11 April 1991. It referred to its letter of 22 January 1991, which had alleged causes of delay, and subsequent correspondence on the issue. It identified the fire loop and storefront issues as the "primary reasons for delays." It also identified 11 other "secondary" issues, and stated that the Navy's refusal to consider compensable time delays for the issues had a "devastating" impact on AEC's financial strength. AEC

"summarized" its job progress by attributing performance delay (a) between September 1989 and December 1990 primarily to the Navy, naming Kimmins as a "lesser" cause, and (b) from December 1990 forward to Kimmins and Cumberland's "restraints, demands, and harassment." Appellant also expressed surprise at CDR Cutler's "decision to issue the default letter" since AEC understood that it would have the opportunity to address the issues raised by the Navy in its show cause letter. (Ex. A-234)

By letter on 23 April 1991, CDR Cutler took exception to appellant's allegations regarding the date of its receipt of the show cause letter, and maintained that appellant had received the letter on 9 April 1991, thus rendering untimely appellant's response to the show cause letter. CDR Cutler did not discuss the substance of appellant's response, but stated that the default termination would not be rescinded. (Ex. A-235)

On 23 April 1991, AEC wrote to Kimmins and complained that, despite Kimmins' promise that it would provide an updated schedule to attach to the March invoice to be sent to the Navy, appellant had not yet received it (ex. G-135). Kimmins responded on 25 April 1991 that it could not prepare the updated schedule until appellant provided the percentages of completion of each construction activity (ex. G-136).

On 2 May 1991, the Navy and Cumberland entered into a takeover agreement for completion of the project (R4, sec. 2, tab V).

On 9 May 1991, appellant timely appealed the default termination.

Following the default termination and appeal, AEC and Cumberland continued to correspond in an adversarial manner over issues such as who was responsible to compensate subcontractors and vendors. AEC continued to blame Cumberland and Kimmins for preventing AEC from paying subcontractors and vendors and for causing the default termination, and Cumberland continued to assert its

position that it was required to retain certain funds. (Exs. G-139, -140 to -146, -148(a) to -148(c)) AEC pursued a legal action against Cumberland, Kimmins and SSI in Florida State court, they agreed to arbitration, and ultimately settled the suit. As part of the settlement, AEC attempted to assign its rights in this appeal to Cumberland and AEC agreed to cooperate in its prosecution (exs. G-148(g) to -148(o)).*

Our findings below relate to items for which appellant was allegedly due a time extension, or otherwise adversely affected its ability to perform, at the time of the default termination.

The Fire Loop

The TS, in Section 02713, Exterior Water Distribution System, stated:

> 6.4 TEST AND INSPECTIONS:
>
> 6.4.1 - All existing and new work constructed under this section of the contract specifications will be subject to visual inspection for faults, defects or leaks and any deviation or omissions must be corrected at once.
>
> * * *
>
> 6.5 TESTING PROCEDURES
>
> * * *

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* We have concluded that the attempted assignment was in violation of statute (95-2 BCA ¶ 27,750).

> 6.5.3 Locating leaks in existing mains: Contractor shall "pin-point" any leaks in existing mains by means of an approved "LEAK DETECTOR" device as utilized by local utility companies, or by any other method as approved by the Contracting officer. Payment for locating leaks shall be on the basis of a change order to be negotiated with and issued by the Contracting Officer.
>
> * * *
>
> 6.7.3 Payment for locating leaks by use of a Leak Detector device or other approved means shall be on the basis of a change order to be negotiated with and issued by the Contracting officer prior to the start of work required.

The TS also included the following special provision, quoted in pertinent part:

> C22 . . . Contractor shall test and inspect all fire hydrants, valves, post indicator valves, connections, bends, piping, etc. in connection with the fire protection system installed on site. Repairs, if any are required as a result of test procedures, will be authorized by the Contracting Officer.

(Ex. G-16)

Paragraph C23 of the special provisions, which did not relate to the fire loop, dealt with known damage to the existing domestic water line and specifically required the

contractor to "excavate" to ascertain the extent of the damage (ex. G-16).

When appellant bid the contract, it assumed that there were potentially some problems with underground work which had been previously performed by Harvesters, and that repairs due to unforeseen conditions would be treated as a change and compensated (tr. 3/261-62). However, it considered that, since the earlier work was presumably performed under Navy inspection, it was generally performed correctly (tr. 5/115, 8/186). Appellant included $5,300 in its proposal for the fire loop, which included only its anticipated costs of pressure testing the system, by using a leak detector as provided in specification section 6.5.3, and no money for excavation. Had its bid included the costs of excavation, it would have included at least $15,000 to $20,000 (approximately $10-$12 per linear foot) (tr. 5/44-45, 96-108, 117, 126-30, 353).

Appellant's 10 April 1989 letter containing the qualifications to its proposal stated that it would "not be held responsible for any existing underground utilities which are not correct or that have been damaged," and that any conflicts between "new" and "existing" work would be the subject of a contract modification (ex. A-5).

It is customary in the industry to test and inspect piping for leaks by using a leak detector rather than by performing extensive excavation (tr. 6/164-65).

The work to test the fire loop system was not originally on the project's critical path. In preparing the original schedule for AEC, Mr. Robinson included three months for the testing of the fire loop, ascertaining any problems, and making the necessary repairs. The schedule anticipated completion of the fire loop work by 9 November 1989. (Tr. 6/102-10)

Upon testing the fire loop, appellant discovered that there were leaks in the system. Upon later excavation and inspection, it determined that Harvesters had failed to

comply with the contract requirements by: (a) using cast iron piping rather than ductile iron piping (tr. 5/347), (b) failing to weld joints (tr. 3/150), (c) failing to use standard pipe lengths (tr. 5/347-48, 6/195, 337-38), (d) omitting and incorrectly sizing and placing concrete thrust blocks (tr. 3/269-70, 5/348), and (e) laying portions of the pipe seven to eight feet below the surface rather than the appropriate depth of four to five feet (tr. 5/347). Because appellant expected to find the piping at the higher depth, it performed the excavation at a slower, more careful pace (tr. 3/352).

Because of test failures, in the fall of 1989 appellant's CQC representative recommended that the entire existing fire loop system be abandoned (tr. 7/316-17; ex. A-283 at CQC Report No. 60). Lt. Gibbons directed that AEC test the system in segments (tr. 3/263-64; ex. A-288 at RFI No. 18); any attempt to uncover and test the entire fire loop system at one time could not be done because it would cause the system to burst or pipes to "jump out" (tr. 3/269). AEC complied with the direction and, by the end of February 1990, the Navy paid it for 98 percent of the value of the work (ex. A-282, Progress Payment Request No. 6). Since the system had passed testing in segments, appellant placed paving over a portion of the fire loop.

In approximately August 1990, appellant tested the entire fire loop system at one time for connection to the water system, but it would not hold the test pressure, and appellant discovered that there were new leaks in the system. In order to repair system leaks, appellant had to excavate the piping, which sometimes required cutting through and removing asphalt that it had already laid. By letter of 18 January 1991, appellant advised the ROICC that the fire loop appeared to have become a critical item and was delaying completion of the project and that appellant might be requesting additional compensation and a time extension. The Navy's ROICC directed that the entire system be excavated, pressurized and tested. Appellant did so and,

after the necessary repairs were made, the fire loop system passed inspection on 8 March 1991. (Tr. 7/215-17, 8/245-46; exs. A-271, -284)

The ROICC accepted the fire loop and verified the acceptance in writing to AEC on 11 March 1991. The letter stated that appellant could commence backfilling and compaction operations and requested that appellant provide a detailed cost breakdown of the fire loop repair as soon as possible. (Tr. 2/59; exs. A-207, 283, 284) By Modification No. A00036, dated 18 April 1991, the Navy unilaterally paid appellant the direct costs of making the repairs, but included neither costs of excavation nor a time extension (R4, sec. 1, tab B; tr. 8/246).

The Robinson analysis indicated that the repairs to the fire loop system created delays on the critical path of performance, and caused appellant a total of 159 days of performance delay primarily in the last half of 1990 which, when combined with the effects of the storefront delay described below, would delay the overall completion date to 16 April 1991. We so find. (R4, sec. 1, tab T; tr. 5/363; ex. G-9)

Cold Water Insulation

During 1990 and early 1991, the parties disagreed as to whether the specifications required appellant to insulate cold water lines, but appellant followed the Navy direction and performed the work in the spring of 1990. The Navy finally agreed that the task constituted a change to the contract requirements. On 5 April 1991, the parties bilaterally agreed to Modification No. A00032 which increased the contract price by $15,887 and extended the contract completion date by 30 days from 23 December 1990 to 22 January 1991. The modification contained a release of time and money resulting from the cold water insulation work. (R4, sec. 1, tab B)

Roof Plywood

The contract specification, at section 06100, required roof plywood which was one-inch thick and fire-retardant (ex. G-16). Among the items listed in appellant's 10 April 1989 letter with its proposal qualifications accepted by the Navy was the substitution of less expensive ¾ inch fire retardant roof plywood, at $22 a sheet, for the specified one-inch fire retardant plywood. Neither appellant's original proposal nor its 10 April 1989 letter identified the roof plywood it intended to provide as CDX grade. (Tr. 3/246, 5/16-18, 8/184-86; exs. A-5, -6, -313) Appellant ordered the plywood and a significant amount of it was delivered to the site (tr. 8/240).

The Navy's Lt. Gibbons received appellant's plywood submittal on 30 October 1989 and returned it disapproved because it was of a CDX grade, which is inferior to that required by the specifications. However, due to a report he had received indicating the possible delamination of fire-retardant plywood at certain temperatures, Lt. Gibbons, by letter of 3 November 1989, asked appellant for an estimate for credit for the substitution of ¾ inch non fire-retardant CDX plywood in lieu of the specified plywood. At the time he made that request, Lt. Gibbons was aware that appellant had already made significant deliveries of the fire-retardant plywood. (Tr. 10/115; exs. A-37, -274)

On 5 April 1990, appellant submitted its cost proposal in the amount of $6,523, which included the costs of restocking the material. After the Navy's request for more information dated 11 May 1990, appellant resubmitted its request on 22 June 1990 and included a request for a time extension and delay damages for 35 days. (Tr. 5/28; exs. A-66, -81)

By Modification No. A00008 dated 1 May 1990, the Navy unilaterally took a credit, later contested by appellant, and reduced the contract price by $10,070. As of 11 January

1991, AEC stated that time was no longer an issue with respect to the plywood issue and, in fact, the Robinson analysis concluded that the plywood issue was not on the critical path, but was concurrent with the storefront delay. (R4, sec. 1, tab B; Contract Modification File; tr. 5/332, 6/36, 47; exs. A-209, G-66)

The Storefront

The contract specifications required a storefront which was to enclose the front of the building. The storefront was identified as being in the critical path in AEC's original baseline CPM schedule. (Ex. G-18)

Although the storefront specifications were written in the manner of performance specifications, they were written around the features of a system manufactured by a company named Kawneer. During negotiations, the Navy agreed to accept a system manufactured by Armalite, which contained some deviations from the specifications, but which cost approximately half as much as the Kawneer system. Appellant's 10 April 1989 letter containing its qualifications to its proposal reflected the Armalite system. (Exs. A-5, -6; tr. 3/246-47, 5/16, 18, 10/110-11)

Despite agreeing to the Armalite system, the Navy later insisted on a more expensive Kawneer system and finally suggested and accepted a third system, made by Ashley, which it had used at another facility (tr. 3/293-94, 5/16, 8/218-21). In the interim, however, while the Navy was attempting to reach a decision, there was substantial performance delay because, without the storefront, appellant could not enclose the building, attain humidity control, and proceed with interior finishing work (tr. 8/222-23).

The Robinson analysis indicated that the work on the storefront was on the critical path of performance, and that the Navy's delay in making a decision had caused appellant 78 days of performance delay in the time period between

October 1989 and January 1990 which, when combined with the effects of the fire loop delay, would delay the overall completion date to 16 April 1991 (R4, sec. 1, tab T; tr. 6/91; ex. G-9). We so find.

Floor Patching and Ceramic Tiling

The contract identified specific areas in which Harvesters had performed poorly with respect to the floor slab construction joints, and required appellant, at its option, to either grind the construction joints or to use a floor "underlayment" to achieve proper leveling. (Ex. G-16)

In February 1991, appellant submitted to the Navy a Request for Information (RFI) indicating that, after completing floor repairs in certain areas, it was still unable to comply with the specified tolerances for finish installation. It requested that the Navy review the specification and visually inspect the concrete floors which were to receive finished flooring to ascertain the nature of the problem. The Navy responded on the RFI as follows: "Perform floor repairs as required by contract – deficiencies will be evaluated only in areas that you have been required or have repaired." [Sic] (Ex. A-288, RFI No. 135)

At no time during contract performance did appellant identify floor patching or joint repair as a task which was delayed due to the fault of the Government (tr. 2/90). Although there is evidence that AEC had to perform more concrete floor patching than reasonably anticipated (tr. 5/365-66, 6/74), we also have evidence that some of the additional floor patching was due to damage caused by appellant (tr. 7/198-200).

The contract required a substantial amount of work in the repair and installation of ceramic tile. Contrary to appellant's allegations, there is evidence that the tile work was not dependent upon the completion of floor patching (tr. 4/185). The primary tile problem was the poor performance

of the original tile subcontractor, which AEC terminated for default (tr. 2/60, 6/119, 7/265). The extent of that poor performance made rework even more difficult, which delayed the finish to the bathrooms, including the installation of fixtures (tr. 2/61).

Electrical Work

As we found above, the Navy issued unilateral contract modifications which, among other things, increased the amount of electrical work appellant was required to perform. The additional electrical work was on the critical path of performance and caused delay of 20 days to the completion date, and we find that drywall patching necessitated by the electrical work extended performance time and the completion date by an additional 10 days. (Tr. 4/320-21; exs. G-4, -23, A-283) We further find that those 30 days of delay would delay the overall completion date from 16 April 1991 to 16 May 1991.

Expert Evidence

The record includes expert analyses of appellant's contract performance and the impact of events upon that performance.

The Robinson analysis was prepared on behalf of AEC. It was a "time impact" CPM analysis, in three-month segments, of contract events occurring to January 1991, and was presented to the Navy in the meeting of 23 January 1991 (R4, sec. 1, tab T; tr. 5/322-25). Mr. George Robinson testified at the hearing, demonstrated considerable experience and expertise, and, although he was limited in the time period to perform his analysis (tr. 6/48-49), he was a very credible witness. The Robinson analysis recognized (a) causes of delay attributable to both AEC and to the Government (tr. 5/327, 339), (b) concurrent causes of delay

which, ultimately did not result in overall performance delay because of other delay causes which turned out to be more critical at the time due to their duration (tr. 5/353-54, 359), and (c) contractor actions which mitigated performance delay (tr. 5/355).

The Robinson analysis concluded that appellant incurred performance delays on the critical path by the Navy's actions, omissions and delays due primarily to events regarding the storefront and repairs to the fire loop, and that those delays would have led to completion of the contract on 16 April 1991. We have so found. (R4, sec. 1, tab T; tr. 5/331, 337-38, 343-53; exs. A-285, G-9)

Mr. George Crowley of Warner Construction Consultants, Inc., also on behalf of AEC, used the Robinson analysis as a starting point and performed what he described as a CPM analysis of contract events occurring from January 1991 until the default termination in April 1991. While using data from the daily reports, the Warner report relied heavily upon interviews which Mr. Crowley conducted with only AEC personnel and which are not reflected in the record except through Mr. Crowley's hearsay recollections. Mr. Crowley did not interview Navy personnel.

The Warner report found that, in the period of 7 January 1991 through 8 April 1991, the critical path of performance included the fire loop repair delays and the floor patching and ceramic tile delays. It concluded that, but for Navy caused delays, AEC would have completed its work on the project by 30 April 1991 and that those delays resulted in a projected completion date of 13 June 1991. (Ex. A-289) Through cross-examination, it was demonstrated that the Warner report contains several factual errors and that it did not include a manpower analysis (tr. 9/313-58). Mr. Crowley also concluded that AEC experienced no delays due to slow payment to subcontractors (tr. 9/355), a conclusion which ignores much of the record for the time period covered by his analysis.

We find Mr. Crowley's testimony to be generally unpersuasive, the Warner analysis to be deficient, and rely upon neither in our findings and conclusions.

On behalf of the Government, Mr. Marc Watson, of Sverdrup Corporation, prepared demonstrative charts including a contract activity analysis for the period January through April 1991 (exs. G-3, -4). Mr. Watson's analysis is not a CPM analysis. Like Mr. Crowley, Mr. Watson used the Robinson analysis as his starting point. Mr. Watson's analysis compares the as-planned activity duration for each of several contract activities with the actual duration for the four-month period, and shows the staffing levels for each activity for each day of performance during the time period. (Tr. 4/61, 71, 87, 308; ex. G-4)

Mr. Watson also prepared a graph depicting the daily balances of the joint bank account during the months of January through April 1991 (ex. G-5). His testimony, while touching on contract performance difficulties, emphasized AEC's financial problems, which he tied to its deteriorating relationship with Kimmins and Cumberland and the retention of funds in the joint bank account. However, Mr. Watson did not identify specific amounts of delay attributable to AEC's financial difficulties and its disputes with its surety. Moreover, notwithstanding his attribution of primary responsibility to the surety for AEC's performance difficulties, Mr. Watson acknowledged that AEC was entitled to a time extension for the electrical work resulting from contract modifications issued in early 1991 (tr. 4/321).

In addition to his contract activity and financial presentation, Mr. Watson prepared a Report of Findings (ex. G-13). At the hearing, the presiding judge deferred a ruling upon the Navy's motion to admit the Report of Findings into evidence. We make that ruling below.

DECISION

The sole issue before us is the propriety of the Navy's default termination of this construction contract. We discuss the merits following our ruling on pending motions.

I. Motions

Motion to Compel Payment of Expert Witness Fees

At the commencement of appellant's discovery deposition of Navy expert Mr. Marc Watson, of Sverdrup Corporation, appellant's counsel agreed to pay Mr. Watson his hourly fee of $150. She later learned that Mr. Watson was charging the Navy $120/hour and she compensated him at that lower rate. The Navy has moved that we compel appellant to pay Mr. Watson the differential, which totals $240. Appellant opposes the motion and contends that it is not obligated to pay the Navy's expert at a higher hourly rate than he is paid by the Navy.

A party deposing the other party's expert is obligated to pay the expert a reasonable fee for time spent in responding to discovery. *Copy Data Systems, Inc.*, ASBCA No. 44058, 98-1 BCA ¶ 29,390. Under the facts presented, we have no reason to conclude that $120/hour is not a reasonable fee. It is not within our province to decide whether appellant's counsel's agreement to pay Mr. Watson the higher fee quoted was an enforceable contract between the two.

The motion to compel is denied.

Motion to Admit Government Expert's Report

As reflected in our fact finding above, Mr. Marc Watson, the Navy's expert, provided expert testimony and demonstrative charts reflecting his factual analysis that were

admitted into evidence. The Navy also offered into evidence Mr. Watson's "Report of Findings" (ex. G-13) and, upon appellant's objection as to its admissibility, the presiding judge deferred ruling on its admission until consideration of the parties' arguments in their post-trial briefs (tr. 4/23).

Mr. Watson was qualified as an expert in (a) construction management, (b) construction financial management, and (c) construction scheduling. His Report of Findings contains a very selective narrative of the project history with heavy emphasis upon AEC's relationship with its surety and its resultant financial problems. It includes no analysis of causes of delay alleged by AEC to be the responsibility of the Navy. The Report of Findings also contains legal opinions on (a) requirements for a default termination, (b) abandonment, (c) assignment, and (d) contract interpretation. Although Mr. Watson admits to lacking expertise regarding sureties (tr. 4/238), his report contains opinions on that subject and even recommendations regarding possible referrals of Cumberland and its associated companies for disciplinary action. The Report of Findings does contain some opinions within Mr. Watson's area of expertise and a few items of a factual nature (*e.g.*, work crew sizes), at least some of which are cumulative to facts contained in his demonstrative charts or his testimony.

Expert legal evidence on issues of law before us is not admissible. *Lockheed Corporation*, ASBCA Nos. 36420, 37495, 39195, 91-2 BCA ¶ 23,903. Evidence on legal issues is, *a fortiori*, not admissible where, as here, that evidence consists of the opinions of one who is not an attorney. Similarly, we have no interest in the opinions of a witness in other areas in which he has no expertise.

The admissibility of expert testimony is within our discretion. *See Milmark Services, Inc. v. United States*, 731 F.2d 855, 860 (Fed. Cir. 1984). Where evidence has both legal and factual content, it may be admitted for purposes of the factual content. While we have little use for

Mr. Watson's Report of Findings, and have fully considered his testimony and accompanying demonstrative charts, we admit the Report of Findings for the limited purpose of opinions within his expertise and for facts which are not cumulative to those found elsewhere in the record.

Motion to Exclude Pleadings and Documents Related to Other Disputes

Appellant requests that we omit from the record state court pleadings and other documents involved in the disputes and litigation between it and Kimmins/Cumberland/SSI because the Navy has failed to prove that those disputes or AEC's relationship with its surety and associated companies were the cause of AEC's performance problems.

We do not agree. Regardless of our conclusions concerning the relationship between AEC and Kimmins, Cumberland and SSI and the impact, if any, of their disputes upon contract performance, the documents and pleadings relate, in substantial part, to performance of the contract and are relevant to the issues before us. They are admitted into evidence.

Motion to Exclude Testimony for Violation of the Sequestration Order

Upon request, the Board issued a sequestration order pursuant to Rule 615 of the Federal Rules of Evidence. That rule states, in part:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion.

Based upon differing recollections of AEC's former counsel and former SBA officials, the parties disagree as to the extent to which, if at all, SBA officials assisted AEC in drafting the Agreement. Initially, appellant offered into evidence the affidavit of its former counsel relating a summary of his meetings with SBA officials regarding the Agreement (tr. 8/202-11). The presiding judge did not admit the affidavit into evidence, but extended the proceedings to permit the former counsel as well as the SBA officials to testify. (The affidavit was later admitted during Navy counsel's attempt to impeach appellant's former counsel's testimony).

Prior to their testimony and prior to appellant's opportunity to interview them, Navy counsel showed the former SBA officials the affidavit of AEC's former counsel, discussed its content with them, and they discussed it with each other. Appellant contends that Navy counsel's conduct violated the sequestration order and that we should exclude the former SBA officials' testimony from the record.

Violations of Rule 615 are not limited to the presence of a witness in the courtroom, but may include a witness reading the transcript of testimony of other witnesses. *Miller v. Universal City Studios, Inc.*, 460 F. Supp. 984 (S.D. Fla. 1978), *rev'd on other grounds*, 650 F.2d 1365 (5th Cir. 1981); *See also United States v. McMahon*, 104 F.3d 638 (4th Cir. 1997). In examining the application of Rule 615, we have looked for the presence of prejudice and have examined the facts surrounding the alleged violation in light of the specifics of the sequestration order in question. *See Robert R. Marquis, Inc.*, ASBCA No. 38438, 92-1 BCA ¶ 24, 692 at 123,169-70; *Collins & Company*, ASBCA No. 23736, 81-2 BCA ¶ 15,189 at 75,158-59.

In this appeal, the sequestration order was general in nature and did not specifically address conduct outside the courtroom. The conduct allegedly in violation of the order involved showing as yet uncalled witnesses an affidavit

(which was not evidence at that time) of another as yet uncalled witness. The contents of the affidavit were substantially more general than was his later testimony, and we conclude that no prejudice resulted from the disclosure. While the safer practice would have been for Navy counsel to have interviewed the former SBA officials and presented their testimony without showing them the affidavit, we conclude that, under the facts before us, the sequestration order was not violated.

Appellant's motion to exclude the testimony is denied.

II. The Merits

The Navy terminated this construction contract for default due to appellant's alleged "failure to make progress in the work and for default in performance." The Navy later added other grounds to justify the termination.

In attacking the propriety of the default termination, appellant, among other things, contends that it was entitled to time extensions due to Navy actions and omissions regarding certain construction items under the contract. Based upon our findings above, we will first discuss those construction items before proceeding to examine their impact, as well as that of other issues, upon the default termination.

Construction Items

1. The Fire Loop System

Under the terms of the contract, AEC was to be paid the cost of repairs to existing systems, and appellant was required to test and inspect the fire protection system, including its underground fire loop system.

Appellant contends that it was entitled to a time extension for this item due to the extensive, unforeseen

repairs required of the fire loop, the initial Navy direction that it test the system in segments, and the requirement that the Navy ultimately imposed that it excavate the entire fire loop to make the necessary repairs. Appellant also argues that the Navy possessed superior knowledge of the extent of the required repairs and that it failed to convey that knowledge to appellant.

The Navy points to the TS provision stating that existing and new work was "subject to visual inspection," and maintains that, since the fire loop was underground, appellant should have included the costs of excavation in its proposal. The Navy further points out that it accepted the fire loop on 8 March 1991, and that the system was, therefore, not a factor affecting performance as of the date of the default termination on 22 April 1991.

Our findings do not support appellant's contention that the Navy possessed superior knowledge regarding the state of disrepair of the fire loop system, and appellant is not entitled to a time extension on that basis.

The specification provision stating that existing and new work was "subject to" visual inspection can not reasonably be read as a requirement that the entire underground system be excavated and visually inspected. Our findings reflect that, in those areas where excavation was required, it was clearly specified. We have also found that the specification included the specific method to be used for leak detection, and that the customary methods of testing and inspecting underground piping do not include excavation of an entire underground system. We are, therefore, unable to conclude, as does the Navy, that appellant's proposal should have reasonably included the costs and time required to excavate the entire fire loop system.

The record reflects that the deficient work performed by Harvesters on the fire loop required very extensive repairs, and that the performance of those repairs caused performance delay of 159 days. That delay was due, at least

in part, to AEC's compliance with Navy directives first to test the system in segments and then, when additional leaks resulted from a test of the entire system, to excavate it in its entirety.

We conclude that, due to the unanticipated extent of repair required to the fire loop and the delay in completing those repairs, appellant, in addition to its direct costs of repair already paid, is entitled to a time extension for that work. That time extension is discussed below.

2. Cold Water Insulation

Our findings reflect that, for this additional work, the parties, on 5 April 1991, bilaterally entered into a contract modification which extended the contract completion date from 23 December 1990 to 22 January 1991. The modification contained a full release and there is no basis upon which to conclude that appellant is entitled to an additional time extension for that work.

3. Roof Plywood

We have found that, as of January 1991, appellant stated that time was not an issue with respect to the roof plywood, that it was not on the critical path, and that its performance was concurrent with that of the storefront. Appellant is, therefore, not entitled to a time extension for this item.

4. The Storefront

We have found that the storefront specifications were written based on the features of a brand named product, that the Navy agreed to accept a less expensive product, that it later required yet another, more expensive storefront, and

that its decision-making process caused performance delay of 78 days.

Appellant is entitled to a time extension, which we discuss below.

5. Floor Patching and Ceramic Tiling

Our findings reflect that, while AEC may have performed more floor patching than it anticipated, the additional work was not established as having been the fault of the Navy nor a cause of performance delay. We also found that problems with the repair and installation of ceramic tile centered around the poor performance of AEC's first tile subcontractor, which it ultimately terminated for default. Appellant is not entitled to a time extension for these items.

6. Electrical Work

We have found that additional electrical work ordered by the Navy increased performance time on the critical path by a total of 30 days for the electrical and necessary drywall patching effort. Appellant is, therefore, entitled to a time extension of 30 days for this item.

Time Extensions

We have found, based upon the Robinson analysis, that performance delays caused by the Navy in connection with the fire loop and the storefront would have led to completion of the contract on 16 April 1991. We have also found that appellant is entitled to a time extension of 30 days due to the additional electrical work. Appellant is therefore, entitled to a time extension to 16 May 1991.

The Default Termination

A default termination is an extreme sanction, tantamount to a forfeiture, and it must be exercised carefully. *Devito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969); *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759 (Fed. Cir. 1987). In order to sustain a default termination, the Government has the burden of proving, based upon a preponderance of the evidence, that the termination was proper.

The FAR clause 52.249-10, Default (Fixed-Price Construction) contained in this contract provides, in part:

> If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will ensure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or any separable part of the work) that has been delayed.

The clause provides the Navy with the default termination remedy where AEC either (a) fails to complete the work, or (b) fails to prosecute the work with the diligence to ensure its completion, with the existence of either event (a) or (b) determined with reference to the time of completion specified in the contract, including any time extension.

It is undisputed that AEC did not complete performance by the 23 December 1990 completion date, that the Navy did not terminate the contract at that time, and that AEC continued to perform beyond that date. The parties, in their briefs, expend considerable effort in debating whether the Navy, by its forbearance, waived that completion date

and whether the waiver doctrine is available in this construction contract where the contractor is paid for work performed after the scheduled completion date.

However, the issue of whether the Navy waived the 23 December 1990 completion date is moot. The record reflects that, due to additional contract work, in the beginning of April 1991 the parties extended the contract completion date to 22 January 1991 and, on 17 April 1991, the Navy unilaterally further extended the contract completion date to 3 March 1991.

The Default clause provides the Government with the remedy of termination where the contractor "fails to prosecute the work . . . with the diligence that will ensure its completion." Whether there is satisfactory diligence, or progress, is determined by whether completion is ensured "within the time specified in this contract including any extension." The Navy has presented no evidence that AEC could not complete contract performance by the extended contract completion date produced by an appropriate analysis of the time extensions to which AEC is entitled. We conclude that the Navy's default termination for failure to make progress was improper.

A default termination may be sustained where it is justified by circumstances at the time of the termination, even if unknown at that time, regardless of whether the contract was actually terminated for another reason. *Joseph Morton Co., Inc. v. United States*, 757 F.2d 1273 (Fed. Cir. 1985); *Pots Unlimited, Ltd. v. United States*, 600 F.2d 790 (Ct. Cl. 1979). In the course of this proceeding, the Navy has contended that there are valid bases for sustaining its default termination other than that stated in the contracting officer's decision.

The Navy contends that the default termination was proper because appellant's actions constituted anticipatory repudiation of the contract. In support of that contention, it points to the AEC letter of 5 April 1991 in which it stated

that it had been forced to reduce its work force at the facility to only its CQC and superintendent and could not continue to incur costs on the project due to the financial restrictions *imposed on appellant by* Kimmins and Cumberland.

In order to constitute anticipatory repudiation or breach, there must be a "definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives." *Corbin on Contracts, § 973.* The repudiation must reflect a clear refusal to perform or be an unequivocal expression of an inability to perform. *Beeston, Inc.*, ASBCA No. 38969, 91-3 BCA ¶ 24,241. It may consist of actions and other factors, in addition to statements of inability to perform, but the words or conduct must manifest "a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time." *Dinger v. Oler*, 117 U.S. 490, 503 (1886). There is no anticipatory repudiation or breach where the contractor's professed inability to perform can be overcome and the contractor expresses a willingness to continue performance. *Fairfield Scientific Corp.*, ASBCA No. 21151, 78-1 BCA ¶ 13,082, *recons. denied*, 78-2 BCA ¶ 13,429, *aff'd*, 655 F.2d 1062 (Ct. Cl. 1981).

We are unable to conclude that AEC expressed an unequivocal unwillingness or inability to perform. In the 5 April 1991 letter cited by the Navy, AEC indicated that it would have to reduce its work force, it pointed to a specific cause of its inability to continue to incur costs, and requested the Navy's assistance in alleviating that cause. We have also found that, in another letter to the Navy of that same date, AEC stated that, due to actions of its surety and the Navy, it could not predict by when it could complete the contract. Those statements are far from an unequivocal expression of an unwillingness or inability to perform.

The Navy also points to appellant's actions of 5 April 1991 as constituting abandonment of the contract. We do

not agree. While there is evidence that appellant removed some equipment and files from the construction site on 5 April 1991, it returned most of what it had removed, and it provided an explanation for the removal. Further, we have found that appellant had personnel at the site until the date of the default termination. We are unable to conclude that AEC abandoned the project.

The Navy also now attempts to justify the default termination on the ground that, at the meeting of 9 April 1991, AEC failed to provide assurances that it could complete the contract. Our findings reflect that appellant attended that meeting under the impression that it was to be a progress meeting, and nothing in the Navy's minutes of the meeting reflect that it was out of the ordinary or that appellant was ever placed in a position where it failed to assure the Navy that it could complete performance.

The Navy contends that the termination for default should be upheld on the ground that AEC failed to fulfill its obligation to make timely and proper payments to subcontractors and suppliers. While there is evidence of subcontractor and supplier complaints regarding payments during the time period in which AEC and Kimmins were in dispute, there is no evidence of a specific subcontractor or supplier that was not ultimately paid or anything even approaching the evidence necessary to support a default termination on that basis.

The Navy asserts that the record, as a whole, supports the conclusion that appellant's performance failures, resulting in the default termination, were due to the lack of funding as a result of the actions of its surety and its associated companies. The Navy contends that "Kimmins/Cumberland/SSI took an active role in driving AEC into a default" and that they "reaped the benefits" of the project by (a) collecting a substantial bond premium, (b) earning money on the project by billing AEC for services, and (c) contracting to complete the project following the

termination. The Navy has even alleged that it had long been the surety's plan to take control of AEC and take over the project. It asserts that "[i]f Kimmins/Cumberland/SSI could complete the work after the termination, there is no reason why they could not have worked with AEC to complete the work prior to AEC's termination." (Post Trial Brief at 119-20)

While there may be some merit to the Navy's allegations regarding the surety's intent, it can not plead ignorance of the extent to which the surety and its associated companies exercised control over AEC's contract performance. The Navy was provided with a copy of the Agreement contemporaneous with its execution, although, because of an apparent breakdown of internal communications, there is some doubt whether any Navy official above the level of contract specialist read it at the time. During contract performance, as well, the Navy was aware of the control exercised over AEC by the surety as well as of their disputes, and there is no contemporaneous evidence of any Navy effort to use its influence to resolve the disputes or, at least, to ease the acrimony to facilitate performance. The ROICC met privately with the surety's representative, advised the surety of the impending termination prior to notifying AEC, and solicited the surety to complete performance.

There can be no doubt that, under the August 1989 Agreement, Cumberland and its associated companies exercised substantial control over AEC's contract. There is reason to surmise that AEC's disputes with its surety played some role in causing its performance problems and, if we were to make the judgment based upon the extent of acrimony and hyperbole in correspondence, we would find that role to be substantial. In the absence of proof, however, there remains doubt as to the extent, if any, that those disputes delayed performance. We have concluded that causes for which the Navy bore responsibility entitled AEC

to time extensions. Even if it were proven that delay for which AEC and/or its surety were responsible was concurrent with delays for which the Navy was responsible, AEC would be entitled to the time extensions.

CONCLUSION

We have determined that appellant was entitled to contract time extensions to 16 May 1991. The Navy terminated the contract for default on 22 April 1991, and the evidence includes no analysis that appellant would not have been able to complete performance by 16 May 1991. The default termination was, therefore, erroneous.

The termination for default was improper and is converted into a termination for convenience. The appeal is sustained.

Dated: 14 August 1998

\s\ Ronald Jay Lipman
RONALD JAY LIPMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur
\s\ Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur
\s\ Mark N. Stempler
MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 42920, Appeal of AEC Corporation, rendered in conformance with the Board's Charter.

Dated: 17 Aug 1998

\s\ Edward S. Adamkewicz
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
AEC Corporation	)	ASBCA No. 42920
	)	
Under Contract No.	)	
N62467-88-C-0646	)	

APPEARANCES FOR THE APPELLANT:

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OPINION BY ADMINISTRATIVE JUDGE LIPMAN
ON MOTION FOR RECONSIDERATION
(Entered December 11, 1998)

The Government has moved that we reconsider our original decision (98-2 BCA ¶ 29,952), in which we decided that the termination for default was improper and converted it into a termination for convenience. In reaching that decision, we concluded that, as a result of Navy actions or omissions, appellant was entitled to contract time extensions

beyond the date upon which the Navy terminated the contract.

In seeking reconsideration, the Government contends that we imposed upon it too stringent a burden of proving that, in support of its termination for failure to make progress, it was "impossible" for appellant to complete performance by the extended completion date. The Government cites the standard that "*at the time of the termination* the contracting officer had a *reasonable* and *valid* basis for concluding on the basis of the entire record that there was *no reasonable likelihood* appellant could perform the contract effort within the time remaining for contract performance." (Gov't Motion at 2, emphasis in original).

We did not, and do not, impose upon the Government the burden of proving that it was impossible to complete performance in the time remaining to do so. The Government correctly states the standard for a default termination for failure to make progress. This case is an unusual one in which to implement that standard, however, because the Government terminated appellant for failure to make progress on a date subsequent to the then-existing formally required contract completion date. The record reflects that, at the time of the termination, the contracting officer did not have a valid contract completion date against which to measure any estimate of the time required to perform the remaining work, and had no reasonable basis to conclude that there was no reasonable likelihood that the remaining work could be performed within a required time for performance.

The Government contends that we erred in concluding that appellant did not anticipatorily repudiate performance of the contract. However, the Government has provided us with no new bases to persuade us that our conclusion on that ground was in error, and there is no reason to discuss it further.

The Government contends that we did not give adequate weight to the testimony of its own expert witnesses and that it was unfairly prejudiced by its lack of notice of, and our consideration of, expert testimony by appellant's witness, Mr. George Robinson. Our opinion explains our rationale in our assessment of the expert testimony by witnesses for both parties, and there is no reason to repeat it here. Mr. Robinson's testimony primarily concerned the delay analysis he performed during contract performance, which both parties' experts used as a basis for their own analyses and opinions. The Government was timely apprised of the nature of that testimony, and any opinion testimony by Mr. Robinson was properly within the context of that analysis.

In seeking reconsideration, the Government also restates its primary contention that appellant's performance problems were the result of actions of its own surety, Cumberland Casualty & Surety Company, and the surety's agents, including Kimmins Contracting Corp. In an attempt to further that contention, the Government now offers us "newly discovered evidence," an affidavit of Mr. Curt Werden, appellant's quality control representative. The Government contends that we should take Mr. Werden's affidavit into evidence because it was unable to locate Mr. Werden prior to the hearing in this appeal, and it attaches an affidavit from Government counsel describing her efforts to do so. In his affidavit, Mr. Werden states that, during contract performance, he was told by Mr. Dave McCall, the Kimmins employee originally assigned by the surety to be appellant's project manager, that it was the surety's plan to "bury" appellant and to take over the project.

Board Rule 13(b) provides that we receive no new evidence following completion of a hearing unless, in our discretion, we order otherwise. To be admissible as newly discovered evidence, the evidence must (a) have existed at the time of trial, (b) be something of which the aggrieved

party was excusably ignorant, (c) have been discovered since the trial, (d) be material and not merely cumulative or impeaching, and (e) be of sufficient consequence that its admission would probably produce a different result. *Data Design Laboratories*, ASBCA No. 21029, 82-2 BCA ¶ 15,932; *Canadian Commercial Corporation*, ASBCA No. 17187, 77-2 BCA ¶ 12,758.

Mr. Werden's affidavit is not acceptable as newly discovered evidence for several reasons. Initially, it is not even clear if the substance of the affidavit would have been admissible at trial; it is hearsay and there has been no showing that it falls within one of the hearsay exceptions. More importantly, the fairly limited efforts to find Mr. Werden described by Government counsel are not sufficient to lead us to conclude that the Government was excusably ignorant of the evidence. We note that, despite the Government's receipt of the affidavit prior to issuance the Board's decision, it did not submit it to the Board until receipt of the adverse decision on the merits. In our original decision, we concluded that appellant's disputes with its surety played some role in its performance problems, but that we lacked proof of the extent, if at all, those disputes delayed performance. Even if we were to accept as true Mr. Werden's allegation that the surety had a plan to "bury" appellant, we still lack the proof that any efforts toward that goal actually delayed contract performance. We decline to take the Werden affidavit into evidence.

Having reconsidered our original decision, we affirm it.

Dated: 11 December 1998

\s\ Ronald Jay Lipman
RONALD JAY LIPMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

\s\ Alan M. Spector
ALAN M. SPECTOR
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

\s\ Mark N. Stempler
MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 42920, Appeal of AEC Corporation, rendered in conformance with the Board's Charter.

Dated: 14 Dec. 1998

\s\ Edward S. Adamkewicz
EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals

United States Court of Appeals for the Federal Circuit

ORDER
(Entered November 30, 2000)

Before MICHEL, Circuit Judge, BRYSON, Circuit Judge, and GAJARSA, Circuit Judge.

A petition for rehearing having been filed by the APPELLEE,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same is, DENIED.

The mandate of the court will issue on December 7, 2000.

FOR THE COURT
\s\ Jan Horbaly
Jan Horbaly
Clerk

Dated: November 30, 2000

cc: Thomas Coulter
Robert G. Watt

NAVY V AEC CORPORATION, 99-1343
(BCA - 42920)

* *

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record

* *

49.402-3 Procedure for default.

(a) When a default termination is being considered, the Government shall decide which type of termination action to take (*i.e.*, default, convenience, or no-cost cancellation) only after review by contracting and technical personnel, and by counsel, to ensure the propriety of the proposed action.

(b) The administrative contracting officer shall not issue a show cause notice or cure notice without the prior approval of the contracting office, which should be obtained by the most expeditious means.

(c) Subdivision (a)(1)(i) of the Default clause covers situations when the contractor has defaulted by failure to make delivery of the supplies or to perform the services within the specified time. In these situations, no notice of failure or of the possibility of termination for default is required to be sent to the contractor before the actual notice of termination (but see paragraph (e) of this section). However, if the Government has taken any action that might be construed as a waiver of the contract delivery or performance date, the contracting officer shall send a notice to the contractor setting a new date for the contractor to make delivery or complete performance. The notice shall reserve the Government's rights under the Default clause.

(d) Subdivisions (a)(1)(ii) and (a)(1)(iii) of the Default clause cover situations when the contractor fails to perform some of the other provisions of the contract (such as not furnishing a required performance bond) or so fails to make progress as to endanger

performance of the contract. If the termination is predicated upon this type of failure, the contracting officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure. When appropriate, this notice may be made a part of the notice described in subparagraph (e)(1) of this section. Upon expiration of the 10 days (or longer period), the contracting officer may issue a notice of termination for default unless it is determined that the failure to perform has been cured. A format for a cure notice is in 49.607.

(e)(1) If termination for default appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of the termination. This notice shall call the contractor's attention to the contractual liabilities if the contract is terminated for default, and request the contractor to show cause why the contract should not be terminated for default. The notice may further state that failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter at a conference. A format for a show cause notice is in 49.607.

(2) When a termination for default appears imminent, the contracting officer shall provide a written notification to the surety. If the contractor is subsequently terminated for default, a copy of the notice of default shall be sent to the surety.

(3) If requested by the surety, and agreed to by the contractor and any assignees, arrangements may be made to have future checks mailed to the contractor in care of the surety. In this case, the contractor must forward a written request to the designated disbursing officer specifically directing a change in address for mailing checks.

(4) If the contractor is a small business firm, the contracting officer shall immediately provide a copy of any cure notice or show cause notice to the contracting office's small business specialist and the Small Business Administration Regional Office nearest the contractor. The contracting officer should, whenever practicable, consult with the small business specialist before proceeding with a default termination (see also 49.402-4).

(f) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

(g) If, after compliance with the procedures in paragraphs (a) through (f) of this 49.402-3, the contracting officer determines that a termination for default is proper, the contracting officer shall issue a notice of termination stating--

(1) The contract number and date;

(2) The acts or omissions constituting the default;

(3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;

(4) That the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;

(5) If the contracting officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;

(6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and

(7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause.

(h) The contracting officer shall make the same distribution of the termination notice as was made of the contract. A copy shall also be furnished to the contractor's surety, if any, when the notice is furnished to the contractor. The surety should be requested to advise if it desires to arrange for completion of the work. In addition, the contracting officer shall notify the disbursing officer to withhold further payments under the terminated contract, pending further advice, which should be furnished at the earliest practicable time.

(i) In the case of a construction contract, promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant that are on the site will be needed.

(j) If the contracting officer determines before issuing the termination notice that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in the Government's interest, the contracting officer may terminate the contract for the convenience of the Government.

(k) If the contracting officer has not been able to determine, before issuance of the notice of termination whether the contractor's failure to perform is excusable, the contracting officer shall make a written decision on that point as soon as

practicable after issuance of the notice of termination. The decision shall be delivered promptly to the contractor with a notification that the contractor has the right to appeal as specified in the Disputes clause.

52.249-10 Default (Fixed-Price Construction).

As prescribed in 49.504(c)(1), insert the following clause:

Default (Fixed-Price Construction) (Apr 1984)

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if--

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include-

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,
(iv) Fires,
(v) Floods,
(vi) Epidemics,
(vii) Quarantine restrictions,
(viii) Strikes,
(ix) Freight embargoes,
(x) Unusually severe weather, or
(xi) Delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(d) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

Alternate I (Apr 1984). If the contract is for dismantling, demolition, or removal of improvements, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This

liability includes any increased costs incurred by the Government in completing the work.

Alternate II (Apr 1984). If the contract is to be awarded during a period of national emergency, subparagraph (b)(1) below may be substituted for subparagraph (b)(1) of the basic clause:

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include--

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,

(x) Unusually severe weather, or

(xi) Delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

Alternate III (Apr 1984). If the contract is for dismantling, demolition, or removal of improvements and is to be awarded during a period of national emergency, substitute the following paragraph (a) for paragraph (a) of the basic clause. The following subparagraph (b)(1) may be substituted for subparagraph (b)(1) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if--

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include--

(i) Acts of God or of the public enemy,

(ii) Acts of the Government in either its sovereign or contractual capacity,

(iii) Acts of another Contractor in the performance of a contract with the Government,

(iv) Fires,

(v) Floods,

(vi) Epidemics,

(vii) Quarantine restrictions,

(viii) Strikes,

(ix) Freight embargoes,

(x) Unusually severe weather, or

(xi) Delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

UNITED STATES CODE
TITLE 41 - PUBLIC CONTRACTS
CHAPTER 9 - CONTRACT DISPUTES

Section 609. Judicial review of board decisions:

(a) Actions in United States Court of Federal Claims; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any

question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) Remand or retention of case

In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgement and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) Consolidation

If two or more suits arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

(e) Judgments as to fewer than all claims

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

(f) Advisory opinions

(1) Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request a board of contract appeals to provide the court with an advisory opinion on the matters of contract interpretation at issue.

(2) An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.

(3) A district court shall direct any request under paragraph (1) to the board of contract appeals having jurisdiction under this chapter to adjudicate appeals of contract claims under the contract or contracts being interpreted by the court.

(4) After receiving a request for an advisory opinion under paragraph (1), a board of contract appeals shall provide the advisory opinion in a timely manner to the district court making the request.